(10)

o. 83-240-ASX
Status: GRANTED

Title: Lawrence County, et al., Appellants
v.
Lead-Deadwood School District No. 40-1

Docketed:
August 15, 1983

Court: Supreme Court of South Dakota

Counsel for appellant: Raywid, Alan

Counsel for appellee: Fuller, A. P.

ntry	Date	Note	Proceedings and Orders
1	Aug 15 1983	G	Statement as to jurisdiction filed.
2	Sep 21 1983		DISTRIBUTED. October 7, 1983
3	Oct 5 1983	P	Response requested. (Due November 4, 1983 - NONE RECEIVED)
5	Nov 7 1983		Order extending time to file response to jurisdictional statement until November 8, 1983.
6	Nov 10 1983		Motion of appellee Lead-Deadwood Sch. Dist. to dismiss or affirm filed.
7	Nov 16 1983		REDISTRIBUTED. December 2, 1983
8	Dec 5 1983	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	Feb 8 1984		Brief amicus curiae of United States filed.
10	Feb 15 1984		REDISTRIBUTED. March 2, 1984
12	Mar 9 1984		REDISTRIBUTED. March 16, 1984
14	Mar 19 1984		REDISTRIBUTED. March 23, 1984
15	Mar 26 1984		PROBABLE JURISDICTION NOTED.
			**********
17	Apr 17 1984		Order extending time to file brief of appellant on the merits until June 11, 1984.
18	Jun 3 1984		Brief amicus curiae of United States filed.
19	Jun 7 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jun 11 1984		Brief of appellant Lawrence County, et al. filed.
21	Jun 11 1984	G	Motion of National Association of Counties, et al. for leave to file a brief as amici curiae filed.
22	Jun 11 1984		Joint appendix filed.
23	Jun 11 1984		Brief of appellants Lawrence County, et al. filed.
24	Jun 18 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
25	Jun 25 1984		Motion of National Association of Counties, et al. for leave to file a brief as amici curiae GRANTED.
26	Jun 21 1984		Record filed.
28	Jul 2 1984		Order extending time to file brief of appellee on the merits until August 11, 1984.
29	Aug 11 1984		Brief amicus curiae of South Dakota filed.
30	Aug 28 1984		SET FOR ARGUMENT. Tuesday, October 30, 1984. (4th case)
31	Aug 11 1984		Brief of appellee Lead-Deadwood Sch. Dist. filed.
32	Sep 12 1984		CIRCULATED.
33	Oct 30 1984		ARGUED.

83-240

Office - Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE
LAWRENCE COUNTY COMMISSIONERS, *Appellants*,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1, *Appellee*.

On Appeal From The Supreme Court
Of The State Of South Dakota

JURISDICTIONAL STATEMENT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether the Supremacy Clause of the United States Constitution voids a South Dakota statute which alters the scheme of distribution of federal funds to units of local government mandated by the Payments in Lieu of Taxes Act.

2. Whether the Supreme Court of South Dakota committed error in failing to properly analyze congressional purpose and intent and in excluding reference to legislative history when it upheld the South Dakota statute challenged as unconstitutional under the Supremacy Clause.

PARTIES TO THE PROCEEDINGS BELOW

Lead-Deadwood School District No. 40-1 was the plaintiff in the trial court and the appellant in the Supreme Court of South Dakota.

Lawrence County and the Lawrence County Commissioners were defendants in the trial court and appellees in the Supreme Court of South Dakota.

The Attorney General for the State of South Dakota was served in the proceedings below but did not appear. Pursuant to Rule 28.4(c) of the Rules of this Court, Appellants state that 28 U.S.C. § 2403(b) may be applicable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

LAWRENCE COUNTY AND THE
LAWRENCE COUNTY COMMISSIONERS, *Appellants*,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1, *Appellee*.

On Appeal From The Supreme Court Of The State Of South Dakota

JURISDICTIONAL STATEMENT

Lawrence County and the Lawrence County Commissioners appeal to this Court and respectfully pray the Court reverse the decision of the Supreme Court of the State of South Dakota and reinstate the findings, conclusions and judgment of the trial court.

OPINIONS BELOW

The findings of fact, conclusions of law and judgment entered by the trial court dismissing Lead-Deadwood School District's complaint for *writ of mandamus* and granting Lawrence County relief on its counterclaim, declaring S.D. Codified Laws § 5-11-6 (1981) unconstitutional for being in conflict with the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07 (Supp. 1981), is not reported. The findings, conclusions and judgment appear in Appendix B *infra* pp. 8a-11a.

The majority opinion of the South Dakota Supreme Court reversing the trial court is reported at ___ S.D. ___, 334

N.W.2d 24 (1983) and appears in Appendix A *infra* p. 1a. The dissenting opinion appears in Appendix A *infra* p. 5a.

JURISDICTION

Appellants Lawrence County and the Lawrence County Commissioners appeal from a decision of the South Dakota Supreme Court in an action commenced by the Lead-Deadwood School District for *writ of mandamus*. The trial court denied Lead-Deadwood School District's prayer for *mandamus* and found for Lawrence County and the Lawrence County Commissioners on their counterclaim declaring, *inter alia*, that the South Dakota statute at issue was void under the Supremacy Clause of the United States and South Dakota Constitutions for conflicting with federal law. On appeal, the South Dakota Supreme Court reversed and ordered that a *writ of mandamus* issue, holding that the South Dakota statute at issue was not in conflict with federal law and therefore not void under the Supremacy Clause.

The decision of the South Dakota Supreme Court was entered on May 18, 1983 and is final. There have been no petitions or orders regarding rehearing. Lawrence County and the Lawrence County Commissioners filed their Notice of Appeal on July 22, 1983, asserting 28 U.S.C. § 1257(2) as the grounds for appellate jurisdiction in this Court on account of the South Dakota Supreme Court's decision sustaining the validity of the South Dakota statute challenged on federal constitutional grounds. Appendix C *infra* p. 13a. *See Xerox Corporation v. County of Harris*, ___ U.S. ___, 103 S.Ct. 523, 525-26 (1982); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Section One of the Payments In Lieu Of Taxes Act,[1] 31 U.S.C. § 1601, provides:[2]

> Effective for fiscal years beginning on and after October 1, 1976, the Secretary is authorized and directed to make payments on a fiscal year basis to each unit of local government in which entitlement lands (as defined in section 1606 of this title) are located. Such payments may be used by such unit for any governmental purpose. The amount of such payments shall be computed as provided in section 1602 of this title.

* * *

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[1] Selected excerpts of the Committee reports and congressional debates with regard to the consideration and passage of the Payments In Lieu Of Taxes Act appear in Appendix D *infra* pp. 14a-31a.

[2] Recodified at 31 U.S.C. § 6902(a). The entire Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07, was recodified in 31 U.S.C. §§ 6901-06 without substantive change by Pub.L. 97-258, 96 Stat. 877 (Sept. 13, 1982). *See* H.R.Rep. No. 651, 97th Cong. 2d Sess. 1, *reprinted in* 1982 U.S.Code Cong. & Ad. News 1895. References throughout the Statement of the Case and Reasons for Plenary Review will be to 31 U.S.C. §§ 1601-07. In response to a decision from the Sixth Circuit, Congress amended the Payments In Lieu Of Taxes Act to add a new section, 31 U.S.C. § 6907, on July 15, 1983. *See infra* note 19 and Appendix E. The President signed the amendment into law on July 30, 1983. Pub.L. 98-63; 129 Cong. Rec. D1095 (daily ed. August 1, 1983).

Section Six of the Payments In Lieu Of Taxes Act, 31 U.S.C. § 1606, provides, in pertinent part:[3]

> As used in this chapter, the term—
>
> * * *
>
> (c) "unit of local government" means a county, parish, township, municipality, borough existing in the State of Alaska on October 20, 1976, or other unit of government below the State which is a unit of general government as determined by the Secretary . . .
>
> * * *

43 C.F.R. § 1881.0-5 provides, in pertinent part:

> (b)(2) The term "unit of general government" excludes single purpose or special purpose units of local government such as school districts or water districts.
>
> * * *

Section Three of the Payments In Lieu Of Taxes Act, 31 U.S.C. § 1603, provides, in pertinent part:[4]

> (a) In the case of any land or interest therein, acquired by the United States (i) for the Redwood National Park pursuant to the Act of October 2, 1968 (82 Stat. 931) or (ii) acquired for addition to the National Park System or National Forest Wilderness Areas after December 31, 1970, which was subject to local real property taxes within the five years preceding such acquisition, the Secretary is authorized and directed to make payments to counties within the jurisdiction of which such lands or interests therein are located, in addition to payments under section

[3] Recodified at 31 U.S.C. § 6901(2). *See supra* note 2. This section has also been amended to further define units of general government, to be determined by the Secretary of the Interior, to include those units which provide certain governmental services. *See infra* note 20 and Appendix E p. 32a.

[4] Recodified at 31 U.S.C. § 6904. *See supra* note 2.

> 1601 of this title. The counties, under guidelines established by the Secretary, shall distribute the payments on a proportional basis to those units of local government and affected school districts which have incurred losses of real property taxes due to the acquisition of lands or interests therein for addition to either such system . . .
>
> * * *

S.D. Codified Laws § 5-11-6 (1981) provides:

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

STATEMENT OF THE CASE[5]

On February 15, 1982, Lead-Deadwood School District No. 40-1 (the "School District") filed its complaint for *writ of mandamus* in the Circuit Court for the Eighth Judicial Circuit of South Dakota. The School District sought to have Lawrence County and the Lawrence County Commissioners (collectively the "County") ordered to distribute to the School District funds received by the County from the United States government under Section One of the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07 (Supp. 1981) (the "Act").[6]

The alleged authority for *mandamus* and the requested distribution to the School District was S.D. Codified Laws ("S.D.C.L.") § 5-11-6, which directed that all federal payments in lieu of taxes, *i.e.*, payments under the Act, be distributed in the same manner as state taxes. Under South Dakota law, the school districts in Lawrence County, including Lead-Dead-

[5] The facts are not in dispute and are based on the opinion below and a stipulation of facts submitted to the trial court.

[6] *See supra* note 2. Section One of the Act, 31 U.S.C. § 1601, provides for payments to counties and other units of local government that have certain federal tax-exempt lands within their boundaries to reimburse those units of local government for lost tax revenues and the costs of providing services for those federal lands. *See infra* p. 11.

wood School District, would have received sixty percent of the Section One payments made by the federal government to the County. *See infra* Appendix A p. 2a, Appendix B p. 10a.

The County answered the complaint and counterclaimed for a declaration that S.D.C.L. § 5-11-6 was in direct conflict with the terms and purposes of the Act so as to be declared void under the Supremacy Clause of the United States Constitution.[7] Section One of the Act provides that the payments to the units of local government may be used for *any* governmental purpose. 31 U.S.C. § 1601. The County argued that, consistent with congressional purpose and the terms of the Act itself, Congress granted the County, as a unit of local government, absolute discretion in determining how to expend the payments it received under Section One of the Act as compensation for the tax immunity of federal lands within its boundaries. The County further argued that the State of South Dakota could not direct any portion of the County's Section One funds to school districts nor any other entity in South Dakota, which were not units of local or general government as defined in the Act and regulations promulgated thereunder, and that the state could not impose any conditions on the County's exercise of its discretion under the Act.

The matter was submitted to the trial court on a stipulation of facts. On September 27, 1982, the trial court entered judgment for the County and against the School District, finding that S.D.C.L. § 5-11-6 stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Act and as such was unconstitutional and void under the Supremacy Clause of both the United States and South Dakota Constitutions. Appendix B *infra* p. 10a.[8]

[7] The County also sought a declaration that the statute was unconstitutional under the Supremacy Clause of South Dakota's Constitution, Art. VI, § 26.

[8] The trial court also held that the County was permitted to use all the payments received from the federal government under the Act for any lawful purpose without regard to S.D.C.L. § 5-11-6. *Id.* at p. 11a. There was no issue presented as to South Dakota's power to restrict the use of any payments in lieu of *state* taxes made by the *state* government to the County.

On October 18, 1982, the School District appealed the trial court's judgment to the South Dakota Supreme Court. On May 18, 1983, the South Dakota Supreme Court issued its opinion reversing the trial court. Appendix A *infra* p. 1a. The court directed that the cause be remanded and that a *writ of mandamus* issue ordering the County to pay over the federal payments received by the County under the Act to the School District in accordance with S.D.C.L. § 5-11-6. *Id.*[8a] The South Dakota Supreme Court did not examine the Act's legislative history or the Act as a whole. The court nevertheless found that S.D.C.L. § 5-11-6 was in harmony with the Act and therefore not an obstacle to the fulfillment of the Act's purposes. *Id.* Two justices of the South Dakota Supreme Court dissented, aruging that S.D.C.L. § 5-11-6 undermined the accomplishment and execution of the full purposes and objectives of Congress by earmarking funds for school districts, contrary to the terms of the Act, the congressional grant of discretion to the County, and the Act's legislative history. *Id.* at p. 5a. The dissent concluded that the trial court's decision should have been affirmed.

The constitutionality of S.D.C.L. § 5-11-6 was initially challenged by the County in the United States District Court for the District of South Dakota well before the School District filed its complaint in state court. In *Lawrence County* v. *State of South Dakota*, 513 F.Supp. 1040 (D.S.D. 1981), *vacated on other grounds*, 668 F.2d 27 (8th Cir. 1982), the district court found that the total discretion given counties under Section One of the Act was abridged by S.D.C.L. § 5-11-6 and declared the state statute void under the Supremacy Clause. *Id.*, 513 F.Supp. at 1043. The United States Court of Appeals for the Eighth Circuit vacated the decision on the grounds that the district court was without jurisdiction to render the declaratory relief because the constitutional challenge to the state stat-

[8a] As of this date, the *writ of mandamus* has not issued.

ute was only defensively raising a federal question and was inadequate support, under the law of the Eighth Circuit, for federal question jurisdiction under 28 U.S.C. § 1331. *Id.*, 668 F.2d at 28, 31.[9] The School District's *mandamus* action was filed in state court three weeks subsequent to the Eighth Circuit's decision.

REASONS FOR PLENARY REVIEW

1. Introduction.

This appeal concerns the constitutionality of a state statute which conflicts with federal law and which purports to substitute a state's judgment for that of Congress. The Payments In Lieu Of Taxes Act provides a comprehensive scheme for minimum payments by the federal government to counties and other units of local government to compensate them for the tax immunity of federal lands within their boundaries. *See infra* p. 11 and Appendix D pp. 14a-23a. The payments under Section One of the Act were intended by Congress to be used by the local governments for any governmental purpose because these local governments were deprived of tax revenues and at the same time were required to provide a variety of services for the maintenance of federal lands. *Id.* Restrictions on the use of these funds were therefore deemed improper. *Id.*

Section One payments are supplemented by additional payments to units of local government under Section Three of the Act for lost revenues due to federal acquisitions of park and wilderness lands which were taken off the tax rolls after 1970. *Id.* pp. 24-25. Section Three payments are paid for only five

[9] Notwithstanding the Eighth Circuit's decision vacating the district court's opinion on jurisdictional grounds, the reasoning in the district court's opinion remains persuasive. Indeed, a district court in Arkansas followed it in finding that an Arkansas statute, similar to S.D.C.L. § 5-11-6 in apportioning payments under the Act, was void under the Supremacy Clause. Altus Denning School District No. 30, et al. v. Franklin County, et al., ___ F.Supp. ___, Civil No. 82-2029 (W.D.Ark. June 1, 1983).

years and provide additional compensation for the sudden loss of tax revenues when federal lands are acquired and taken off the tax rolls. *Id.* Section Three payments, unlike Section One payments, are to be distributed not in the local government's discretion, but to counties and affected school districts according to guidelines of the Secretary of the Interior. *Id.*

South Dakota has passed legislation which changes this federal scheme. South Dakota law would require that all federal payments under the Act, including Section One payments, be distributed in the same manner as regular tax proceeds and not, as the Act directs, to the units of local government to be spent in their discretion. *See infra* p. 14. As a result, over sixty percent of the payments under the Act would go directly to school districts in the County. This scheme not only conflicts directly with the Act, but frustrates both the express and implied purposes of the Act by substituting the state's judgment for that of Congress. *Id.* Congress recognized that the special costs to units of local government of providing services for federal lands were unique. *See infra* Appendix D. Congress also found that other statutes which provide payments for federal lands directly to the state governments oftentimes did not result in any compensation going to the counties or were restricted to use for roads or schools and did not compensate the local governments for the special costs of maintaining federal lands. *Id.* and *see infra* p. 23. Congress therefore determined that payments under the Act should go *directly* to the units of local government and not be earmarked for any special purpose and that the local governments would have absolute discretion in determining where to spend the funds they receive under Section One of the Act.[10]

[10] Congress' recent amendment to the Act adding 31 U.S.C. § 6907 strengthens this conclusion. *See infra* Appendix E. State legislation may only direct payments under the Act to other units of local government which provide *general* governmental services, which units do *not* include special purpose districts such as school districts. *Id.* and *see infra* notes 21, 28 and 33.

The Supremacy Clause of the United States Constitution voids state laws which are in conflict with the terms or purposes of federal law. The South Dakota statute at issue conflicts both with the express terms of the Act as well as its purposes and congressional intent. First, the federal government's authority to regulate public lands is absolute and any federal statute or regulation dealing with public lands preempts state legislation on the subject. *See infra* p. 16.

Second, the Act's primary and overriding purpose is to reimburse units of *local* government both for the loss of their tax revenues and the special costs of providing services for these tax-exempt lands. *Id.* It is of the utmost significance that Congress did not reimburse the *state* governments or otherwise involve them in the scheme of payments. Nowhere does the Act authorize the states to determine the governmental purposes for which a unit of local government can expend its Section One receipts. Indeed, the legislative history of the Act leaves no doubt that—largely because of the inequities of distributions from state governments under other statutes—Congress vested absolute discretion in the units of local government to determine which of their governmental purposes would be most appropriately served by the expenditure of their Section One receipts due to the unique costs of services required by the presence of federal lands within their boundaries. *Id.* South Dakota can neither defeat nor alter this federal plan by legislation.[11]

Third, any vestigial interest the state may have in compensating school districts is already provided for in Section Three of the Act. *See infra* pp. 24-25. Clearly, had Congress

[11] Under the recent amendment adding 31 U.S.C. § 6907, the states are authorized only to redistribute Section One payments among smaller units of local government in proportion to the amount of tax-exempt lands within their respective boundaries. *See infra* Appendix E. Accordingly, state legislation, such as S.D.C.L. § 5-11-6, cannot redistribute payments to entities other than units of local government and not in proportion to the amounts of federal lands within the units' boundaries. *See infra* note 33.

wanted Section One payments to go directly to school districts, Congress would have expressly stated it in Section One as it did in Section Three. This conclusion is buttressed by the fact that school districts are expressly excluded from the definition encompassing units of local government under the Act and the Act's implementing regulations so as to be ineligible to receive Section One payments directly. *Id.*[12]

The South Dakota Supreme Court therefore committed a substantial error in its parochial review of S.D.C.L. § 5-11-6 and the constitutional issues when it upheld the South Dakota statute challenged under the Supremacy Clause. *See infra* p. 25. The crux of the court's error was its failure to examine the Act in the terms of congressional purpose which is clearly stated both in the Act and in the Act's legislative history. *Id.* This error was pointed out in the dissent which found, after examining the Act's legislative history and determining congressional purpose, that the South Dakota statute was void under the Supremacy Clause. *Id.* The South Dakota Supreme Court's failure to preserve the supremacy of federal law not only disrupts the distribution of all of the payments under the Act in South Dakota but threatens the entire federal program distributing $100 million annually to over a thousand local governments in forty states. *See infra* p. 30.

For these reasons and those presented below, Appellants submit that the South Dakota Supreme Court's decision should be reversed and the decision of the trial court reinstated.

2. Federal Payments In Lieu Of Taxes.

On October 10, 1976, Congress passed the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 1601-07,[13] which provides for pay-

[12] Under the recent amendment to 31 U.S.C. § 6901(2), Congress further defined units of local government in terms of providers of *general* governmental services. Appendix E *infra* p. 32a. School districts do not provide such *general* services. *Id.* and *see* 43 C.F.R. § 1881.0-5.

[13] *See supra* note 2.

ments by the federal government to units of local government within the states which have certain federal tax-exempt lands within their boundaries.[14] S.Rep. No. 1262, 94th Cong. 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5968 ("S.Rep. No. 1262"); H.R.Rep. No. 1106, 94th Cong. 2d Sess., 4-5 (1976) ("H.R.Rep. No. 1106").[15] These federal lands, known as "entitlement lands," were determined by Congress to have adversely affected the tax base of the various local governments where the lands are located.[16] *Id.* The recommendation of the Public Land Law Review Commission was that certain federal lands must be preserved so that they may be used and enjoyed by all Americans and that the United States was obligated to spread the burden of this policy among the public at large so it would not be borne by those localities where the federal lands are located.[17] The Act translated that basic principle into law by "recogniz[ing] the burden imposed by the tax

[14] Approximately one thousand counties in forty states have 761 million acres of federally owned and tax-exempt lands within their boundaries and receive payments under the Act. S.Rep. No. 1262 at 6. These payments approach $100 million annually. Department of Interior, *Payments In Lieu Of Taxes*, fiscal year 1982. Payments made to state and local governments under certain revenue sharing acts are subtracted out from the Section One payments. 31 U.S.C. § 1604. *See infra* p. 14.

[15] Selected excerpts of these reports appear *infra* in Appendix D p. 14a.

[16] Entitlemant lands include those lands that are: (1) in the national park or national forest systems; (2) administered by the Bureau of Land Management; (3) dedicated to federal water resource projects; (4) used by the Army for mobilization and reserve training; (5) dredge disposal areas; or (6) in the vicinity of Purgatory River and Pinyon Canyons, Colorado. 31 U.S.C. § 1606(a). Lands excluded from the definition, and for which no payments are made under the Act, include some 60 million acres administered by the Departments of Defense, Transportation and other agencies. S.Rep. No. 1262 at 14, n. 15.

[17] Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress by the Public Land Law Review Commission* (Washington, D.C. 1970), at 236 *quoted in* S.Rep. No. 1262 at 6.

immunity of Federal lands [and] providing minimum federal payments to units of local government within the boundaries of which these lands lie." S.Rep. No. 1262 at 6. One of Congress' overriding concerns was to provide compensation to the local governments for the costs to the local governments of providing police, fire and other services for maintaining the federal lands which costs were compounded by the fact that the lands were tax-exempt or produced inadequate revenues. *See infra* p. 23.[18]

A "unit of local government" is defined to include counties, parishes, townships,[19] municipalities, boroughs, or other unit of government below the state which is a unit of general government as determined by the Secretary of the Interior. 31 U.S.C. § 1606(c).[20] Interior's regulations provide that special

[18] The Act employs a formula for computing payments to a unit of local government based on the total acreage of entitlement lands within its boundaries limited by a *per capita* population factor. 31 U.S.C. § 1602. The County received approximately $400,000 in payments under the Act for 1979-1981. *See infra* Appendix A p. 1a and *infra* p. 30.

[19] The Secretary of the Interior originally determined that some townships were not eligible to receive payments under the Act. 43 C.F.R. § 1881.0-5 (1980). Six townships in Michigan challenged the regulation and were determined to be proper recipients of Section One payments. Mead Township v. Andrus, 695 F.2d 1006 (6th Cir. 1982). Partially in response to this decision, Congress added 31 U.S.C. § 6907 which allows states to redistribute payments under the Act to smaller units of general government, such as townships, but upholds the Secretary of the Interior's authority to determine which unit of local government would be the initial recipient of any payments under the Act. *See infra* Appendix E p. 33a.

[20] Congress' recent amendment to 31 U.S.C. § 6901(2) (formerly § 1606(c)) expressly adopts the general governmental service definition for units of local government. *See infra* Appendix E p. 32a, and note 28.

purpose units such as school and water districts are *not* units of general government and are ineligible to receive Section One payments directly. 43 C.F.R. § 1881.0-5 (1983).[21] The units of local government are to use the payments they receive under Section One of the Act for *any* governmental purpose, consistent with the varying types of services the local governments provide for federal lands. *See infra* p. 23 and Appendix D p. 16a. Indeed, the legislative history of the Act leaves no doubt that the units of local government were to have absolute discretion in determining how and where to expend Section One funds—in large part due to the inequities of distributions under other statutes directly to *state* governments. *See infra* p. 22 and Appendix D pp. 16a-17a.

However, S.D.C.L. § 5-11-6 disrupts the federal scheme by imposing restrictions on the local government's use of Section One payments. The South Dakota statute provides that all federal payments in lieu of taxes to units of local government in South Dakota are to be distributed in the same manner as normal tax proceeds. This scheme of distribution would result in the direct payment to the School District and other school districts in Lawrence County of sixty percent of the funds that are to be paid to the County under Section One of the Act. Appendix A *infra* p. 2a.

Congress expressly determined that payments were to go to counties and not to state governments, so as to avoid the state governments' control over the distribution of the payments. An examination of Section Four of the Act, 31 U.S.C. § 1604, underscores this determination. That section lists ten statutes which provide for revenue sharing payments to be made to

[21] This determination finds direct support in the legislative history. "The definition of 'unit of local government' assures that counties, cities, towns and townships . . . and other units of local government that have general governmental responsibilities, as opposed to single purpose functions such as school districts and water districts, will be the recipients of these payments." H.R.Rep. No. 1106 at 12; Appendix D *infra* p. 23a; Appendix E *infra* p. 32a.

state[22] and local governments[23] to return a percentage of the revenues derived by the federal government from the operations on certain federal lands. Those payments are generally earmarked for particular purposes and are subtracted out from any Section One payments to be made to the local governments to avoid double payment. 31 U.S.C. § 1602(a). In response to the inequities of those distributions, Congress provided that payments under Section One of the Act would go *directly* to the local governments so the states would not be determining their distribution, nor restricting their use to particular purposes. *See infra* Appendix D pp. 15a-18a.[24] The South Dakota statute seeks to substitute the state's judgment for that of Congress in attempting to impose restrictions on the use of Section One payments, which Congress determined should not be imposed, and by directing payments to entities other than units of local government. The state statute is therefore void under the Supremacy Clause.

3. The Supremacy Clause.

The starting point for Supremacy Clause analysis is well established in the precedent of this Court. There is no question that Congress may, within constitutional limits, preempt state

[22] *See, e.g.*, 16 U.S.C. § 500 (payment of 25% of national forest receipts to states for schools and roads); 30 U.S.C. § 919 (payment of 50% of oil and gas royalties from federal lands to states for expenditures as they direct).

[23] *See, e.g.*, 7 U.S.C. § 1012 (25% of certain farm revenues paid to counties for schools and roads).

[24] The restriction on the use of federal funds in the Section Four statutes was one of the primary reasons for establishing that Section One payments were to be used "for *any* governmental purpose." *See infra* Appendix D p. 16a. Those statutes should be read *in pari materia* with the Act in determining its construction and meaning. 2A Sands, Sutherland *Statutory Construction* § 51.03 (4th Ed. 1973). The restrictions on the use of funds in those statutes support the conclusion that the "*any* governmental purpose" language in the Act meant that *no* restrictions were to be imposed on the use of Section One payments.

authority to legislate in a particular area in express terms. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Further, Congress may implicitly preempt state regulation where "[t]he 'scheme of federal regulation . . . [is] so persuasive as to make reasonable the inference that Congress left no room [for the States] to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. ____, ____, 103 S.Ct. 1713, 1722 (1983), *citing Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. ____, ____, 102 S.Ct. 3014, 3022 (1982) and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Where Congress has entirely displaced state regulation, state law is preempted and nullified to the extent it conflicts with federal law. *Pacific Gas & Electric Co.*, ____ U.S. at ____, 103 S.Ct. at 1722. "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility," *Id. citing Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id. citing Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *Accord, Fidelity Federal Savings & Loan*, 102 S.Ct. at 3022; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). A determination of conflict "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict" and "in deciding whether any conflict is present, a court's concern is necessarily with the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted." *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981). Most importantly, the Court must "consider the relationship between [the] state and federal laws as they are

interpreted and applied, *not merely as they are written*." *Jones* v. *Rath Packing Co.*, 430 U.S. at 526 (emphasis supplied). Furthermore, "[t]he purpose of Congress is the ultimate touchstone." *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

First, the South Dakota statute is preempted by the Act because it purports to regulate the federal government's public lands, an area exclusively reserved to Congress by the Property Clause, Article IV, § 3 cl. 2 of the United States Constitution. *See Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21-22 (1952). Under the Act, Congress has determined that units of local government, and not state governments or special districts, are to be compensated directly for the costs associated with the presence of federal lands within their boundaries. 31 U.S.C. § 1601; *see infra* Appendix D p. 19a. This determination is final and state legislation affecting the determination is preempted both by the Act's grant of discretion to the counties to expend funds for *any* governmental purpose[25] and the fact that the Act itself pertains to federal lands, an area of exclusive federal control. *Kleppe* v. *New Mexico*, 426 U.S. at 542-43.

Further, the South Dakota statute requires payments to go directly to school districts. Although the County's *voluntary*

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[25] Congress can constitutionally delegate its decision-making power as to expenditures of these funds to counties consistent with the Property Clause. *See* United States v. Ferry County, 511 F.Supp. 546, 552 (E.D.Wash. 1981). Furthermore, the government can impose terms and conditions upon how its payments to the local governments are to be disbursed. King v. Smith, 392 U.S. 309, 333 n. 34 (1962). Here, Congress determined that units of local government are to expend funds in *their* discretion and "a state is without power by reason of the Supremacy Clause to provide the conditions on which the federal government will effectuate its policies." United States v. Georgia Public Service Commission, 371 U.S. 285, 293 (1963).

distribution of Section One payments to the School District may be consistent with the Act,[26] any attempt to regulate this distribution by *requiring* that payments be made directly to the school district would be, in effect, a requirement that the Section One funds go to an entity other than a unit of local government as defined in the Act[27] and in Interior's regulations.[28] This conflicts directly with the Act's payment plan, notwithstanding the fact that payment to a school district may be deemed a governmental purpose. The state does not

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[26] If the units of local government want to distribute some of the money to school or other special purpose districts, they certainly could as such a distribution would likely qualify as a use for a "governmental purpose." Lawrence County v. State of South Dakota, 513 F.Supp. at 1042; Kendall v. Towns County, 146 Ga.App. 760, 247 S.E.2d 577 (1978).

[27] 31 U.S.C. § 1606(c) does not list school districts as eligible units of local government, and the legislative history expressly excludes them. *See supra* note 21. In this regard, Congress' express inclusion of school districts in Section Three of the Act indicates that the lack of school district specification in Section One means that Section One payments are not to go directly to the school districts. *See infra* p. 25. The rule of statutory construction is that where Congress has employed a term in one place and excluded it in another, it should not be implied where excluded. *See* Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 515 (1963). Further, Congress' recent amendment defines units of local government in much the same manner as Interior's regulations which exclude school districts. *See supra* note 21 and *infra* note 28; Appendix E. p. 32a.

[28] 43 C.F.R. § 1881.0-5. Interior's regulations in this area are entitled to deference and are controlling as to the operation of the statute. Fidelity Federal Savings & Loan Assn., 102 S.Ct. at 3022. Further, Interior's determination that school districts are not units of government so as to be eligible to receive Section One payments is consistent with the Act, as well as the Act's legislative history and has sustained judicial challenge. *See supra* note 21 and Altus Denning School District No. 31 *supra* note 9. Indeed, the correctness of this determination is confirmed by the recent amendment to the Act. *See supra* notes 19 and 20.

retain the authority to compel the county to do what it *could* otherwise do. *Chicago & North Western Transportation Co.*, 450 U.S. at 318. The South Dakota statute conflicts directly then with Congress' scheme for distributing Section One payments and is therefore void under the Supremacy Clause.[29]

There are two district court decisions which hold that a state's tampering with a federal plan for distributing payments is unconstitutional. In *Shepheard* v. *Godwin*, 280 F.Supp. 869 (E.D.Va. 1968), the court struck down a Virginia law which affected Congress' scheme for providing compensation to certain school districts. Congress had sought to provide extra payments to those school districts whose populations were enlarged by federal employees' children but whose revenues had been decreased because of the presence of federal lands. 280 F.Supp. at 871. The federal government determined that supplemental payments should go directly to these school districts, but Virginia law provided that these supplemental payments would be subtracted when determining the amount of the state's payments to the school districts, thereby eliminating the helpful effect of the federal payments. 280 F.Supp. at 872-73. In holding the Virginia law invalid under the Supremacy Clause, the court concluded that "the State formula wrenches from the impacted localities the very benefaction the act was intended to bestow. The State plan must fall as violative of the Supremacy Clause of the Constitution. Our decision rests entirely on the terms, pattern and policy of the act." *Id.* at 874. The court also found that the absence of any restriction upon state action in the statute supported, rather than detracted from, the conclusion that the states could not legislate in the

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[29] *See* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), where this Court struck down a diversion of federal pension benefits pursuant to a state's community property law. Congress had determined that the benefits go to a retiree alone and the state could not reallocate them. *Id.* at 583-84.

area or otherwise tamper with the federal payment scheme (*Id.* at 875)

> . . . as we have already noted, the moneys are paid to the locality and not to the State, and there was no apparent reason to include any restriction upon the State. Moreover, *this omission from P.L. 874 originally, or as reenacted, would seem to imply that no touch, direct or indirect, of the money by the State was even remotely permissible.* (emphasis supplied)[30]

This same conclusion was reached by the court in *Hergenreter* v. *Hayden*, 295 F.Supp. 251 (D.Kan. 1968). There the court struck down a Kansas law which sought to realign similar federal payments (*Id.* at 255):

> Neither of defendants' contentions can be sustained. We think it is clear upon the law and the evidence that the State of Kansas is tampering with the distribution of federal funds contrary to Congressional intent expressly in P.L. 874, and hence is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2.
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> The admitted purpose of the Kansas legislature, no matter how laudable its motive or, theoretically, how valuable its end in aiding education in federal impact areas, was to

[30] Where a state asserts control over federal activities or obstructs congressional purpose, an authorization of state regulation would be found only where Congress explicitly mandates or clearly and unambiguously authorizes such regulation. Don't Tear It Down v. Pennsylvania Avenue Development Corp., 642 F.2d 527, 536 (D.C.Cir. 1980). Such a mandate or authorization is absent here. Under Congress' recent amendment, state regulation is only authorized to the extent of redistributing payments among units of local government and not determining governmental purposes for which the local governments can use their Section One payments. *See infra* Appendix E p. 36a. Accordingly, the Act does not authorize states to redistribute federal funds in the manner prescribed by S.D.C.L. § 5-11-6.

> substitute state judgment for federal judgment, as reflected in the state and federal statutes considered here. No matter how salutary the state legislation, it must give way under the Supremacy Clause.

The South Dakota statute is in direct conflict with the terms of the Act as it redistributes Section One payments contrary to the federal scheme and substitutes the state's judgment for that of Congress. Accordingly, S.D.C.L. § 5-11-6 is void under the Supremacy Clause.

4. Congressional Purpose.

The South Dakota legislation also frustrates congressional purpose. The legislative history of the Act[31] and statements of the Act's supporters and sponsors[32] make it abundantly clear that when Congress was designating Section One payments to be used by local governments for any governmental purpose, that their discretion was absolute. This would achieve the purpose of providing reimbursement directly to the local governments impacted by the presence of federal tax-exempt lands. (H.R.Rep. No. 1106 at 12, Appendix D *infra* p. 22a):

> . . . [T]he Committee believes that payments under H.R. 9719 should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. *The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose.* (emphasis supplied)

State income and sales taxes as well as other revenue sharing provisions which allow some revenues generated on federal lands to go to the states were deemed inadequate to compensate the units of local government which must provide local services for federal lands. Thousands of visitors come each year to some federal lands, yet the income and intangible economic benefits to the local economy "do not usually accrue

[31] *See infra* Appendix D p. 14a.

[32] *See infra* Appendix D p. 23a.

to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands." S.Rep. No. 1262 at 9; Appendix D *infra* p. 16a.

As a further example of Congress' intention to rely exclusively on the local government's discretion in determining the allocation of payments under the Act, Congress recognized that the control states exert under revenue sharing acts often resulted in counties receiving little or no compensation. (S.Rep. No. 1262 at 9; Appendix D *infra* p. 16a):

> Many of the revenue sharing provisions permit the States to make the decisions on how tne funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt

It is clear, then, that Congress intended to provide payments under Section One of the Act to be used by the counties for their particular needs as they saw fit. "These reports and the other evidence cited by this Court clearly establish that Congress intended to provide monies under [31 U.S.C.] § 1601 to the counties for them to use for their particular needs." *Lawrence County* v. *State of South Dakota*, 513 F.Supp. at 1042. At the time the Act was debated and passed, congressmen uniformly recognized that payments under the Act *should* go directly to the units of local government and not be earmarked for specific purposes such as roads or schools so the local governments could use the funds as they determined. Appendix D *infra* pp. 23a-31a.

The absolute discretion vested in the units of local government cannot be compromised by any state interest in treating in lieu payments the same as tax proceeds. Congress' decision to treat federal payments under Section One of the Act differently from tax proceeds is not only a statement of congressional preference expressed in the Act and its legislative history, but quite logical. In finding that the existing revenue sharing provisions were inadequate, Congress noted the different types of costs incurred in supporting activities on federal as opposed to private lands.

> Even in the few instances when a local government's share of the various revenues and fees is sufficient to meet service demands arising from the Federal lands and to approximate the loss of ad valorem tax revenues which would otherwise be generated by those lands, *too many of the revenue sharing provisions restrict the use of funds to only a few governmental services—most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands.* These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.
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> While the Commitee does not discount the fact that some benefits accrue to localities where national parks, monuments and wilderness areas are located, the revenues produced for local community do not match the burdens of providing additional police and fire protection, search and rescue service, medical and hospital facilities, and other governmental responsibilities required in and around these areas because of the influx of visitors.

S.Rep. No. 1262 at 9, 13 (emphasis supplied); Appendix D *infra* pp. 16a, 17a. Counties and other units of local government receiving Section One payments were to have absolute discretion in distributing Section One payments. Congress recognized that the burden of tax-exempt property falls directly on the units of local government which must provide police, fire and other services and therefore the Act provides that the

counties and *not the states* are to determine how Section One payments are to be distributed. The Act's purpose in making these payments to units of local government for their discretionary expenditure would be frustrated by South Dakota's attempt to restrict the use of the payments to one or more particular purposes, and any such attempt is constitutionally void.[33] *See Perez* v. *Campbell*, 402 U.S. 637, 650 (1971); *National City Lines, Inc.* v. *LLC Corp.*, 687 F.2d 1122, 1132 (8th Cir. 1982); *Hergenreter* v. *Hayden*, 295 F.Supp. at 255.

Congress did express special concern for affected school districts and for their compensation under a separate section of the Act. As a supplement to payments under Section One of the Act, Section Three of the Act provides for additional payments to units of local government for lands acquired for national park systems or forest wilderness areas after December 31, 1970. 31 U.S.C. § 1603. Unlike Section One payments, which are not earmarked for any special purpose, nor administered under any guidelines, Section Three payments are to be distributed under guidelines established by the Secretary of the Interior on a proportional basis to counties *and* affected school districts which have incurred losses of real property taxes as a result of the addition of land to the federal park and wilderness systems. *Id.*

These Section Three payments provide supplemental assistance to the units of local government and school districts for five years after the land's acquisition. These payments are designed to alleviate the *immediate* impact of removing land

[33] Congress' recent amendment authorizes states to make limited redistributions of payments under the Act among units of local government. *See supra* note 30 and *infra* Appendix E. This limited authority does not support the complete rewriting of Congress' plan in S.D.C.L. § 5-11-6. Rather, the limited authority in the amendment supports the conclusion that the states had *no* authority to redistribute the payments at all; otherwise the new section would be mere surplusage. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978).

from the tax rolls. S.Rep. No. 1262 at 18; Appendix D *infra* p. 18a. *See also* H.R.Rep. No. 1106 at 11; Appendix D *infra* p. 21a. This express provision providing compensation for school districts in Section Three supports the conclusion that Congress did not intend any of the Section One payments to go to the school districts except those the County independently decided to provide. *See supra* note 27.

5. Error Of The South Dakota Supreme Court.

As the foregoing amply demonstrates, the South Dakota legislation is void under the Supremacy Clause because it directly conflicts with the Act and frustrates congressional purpose. The errors committed by the Supreme Court of South Dakota in failing to reach this result are twofold. The court first failed to analyze any of the Act's legislative history. Second, the court analyzed only one sentence of the Act in isolation when it concluded that S.D.C.L. § 5-11-6 was in harmony with the Act. These errors prevented a complete evaluation of congressional purpose which is the touchstone of Supremacy Clause analysis. *See Malone* v. *White Motor Corp.*, 435 U.S. at 504.[34]

In ignoring the Act's legislative history, the South Dakota Supreme Court misused the well worn maxim that where legislation is purportedly clear and unambiguous on its face, there need be no resort to extrinsic aids to determine its meaning or purpose. In refusing to examine the legislative history—or even the other provisions of the Act—the court below reasoned (Appendix A *infra* p. 3a):

> [The County] would have us launch this inquiry with an examination of the legislative history of the Act. However, resort to legislative history is justified only when

[34] The South Dakota Supreme Court did not challenge the County's argument that federal law preempted conflicting state law under the Supremacy Clause. Appendix A *infra* p. 2a. The court simply failed to perform the required analysis to determine whether state law did conflict with the terms and purposes of the Act.

legislation is ambiguous or its literal meaning is absurd or unreasonable. Absent these circumstances we must give legislation its plain meaning. We cannot amend it to produce or avoid a particular result . . . In our view, the scriveners of 31 U.S.C. § 1601, wrote in plain, clear and rational language. We therefore need not look to legislative history. By the plain words of 31 U.S.C. § 1601, the federal money distributed to [the County] "may be used by such unit for any governmental purpose." S.D.C.L. § 5-11-6 requires distribution of these federal payments as taxes are distributed and thus school districts are recipients. Support of school districts is a governmental purpose.

* * *

[The County] receive[s] federal money in lieu of taxes that the entitlement land would be subject to if it were not owned by the federal government. One such tax is a school tax. We find no conflict between the two laws. If Congress intended to prohibit § 1601 funds from going to school districts, it could have done so by writing that prohibition into § 1601. However the only restriction placed on these funds is that they be used for a governmental purpose, which it is under S.D.C.L. § 5-11-6.

It is evident that the court was using the "plain meaning rule" to foreclose any analysis of legislative history which contradicts its conclusion.[35] The legislative history clearly demonstrates that the Act's overriding purpose was to provide local governments with funds to be used, as they determined, to pay for the unique costs associated with providing services for federal lands within their boundaries. *See infra* Appendix D pp. 17a-21a. The Act's legislative history and the express

[35] Actually, the court appears to be searching for a justification for its conclusion because it did not even analyze the "plain meaning" of the Act correctly. It is "plain" that South Dakota's attempt at defining a governmental purpose under the Act is inconsistent both with the word *any* as well as the grant of the funds to *local* as opposed to *state* governments. The plain meaning of the Act therefore supports a finding that the state statute conflicts with the Act.

congressional purposes stated therein cannot be excluded merely because language "on its face" may be clear. "Even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1979). *See also Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) (plain meaning rule does not preclude consideration of persuasive evidence if it exists). Further, as this Court concluded in *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976), *citing United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-44 (1940):

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

See also Dickerson v. *New Banner Institute, Inc.*, ___ U.S. ___, ___, 103 S.Ct. 986, 994 (1983) ("as in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes congress sought to serve"); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 ("a Supremacy Clause inquiry requires [the court] to consider the relationship between state and federal laws as they are interpreted and applied not merely as they are written."); *Rocky Mountain Oil & Gas Assn.* v. *Watt*, 696 F.2d 734, 745 (10th Cir. 1982) ("congressional purpose and intent are best divined by examining the statute's legislative history). *See generally* Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Col.L.Rev. 1299 (1975).

Therefore, the South Dakota Supreme Court's attempt to ascertain the meaning of the Act on its face was an incomplete inquiry; this is made evident by the fact that statutory purpose is more clearly determined from the accompanying legislative

history, than from a narrow reading of the Act. *See Watt* v. *Alaska*, 451 U.S. at 266. Indeed, employing the Act's legislative history, the dissent concluded that S.D.C.L. § 5-11-6 *did* conflict with federal law. Quoting S.Rep. No. 1262 at 9 (*see* Appendix D *infra* p. 16a), Justice Dunn reasoned (Appendix A *infra* p. 6a):

> This statement makes it abundantly clear that *Congress was directing the states to keep their noses out of the manner in which a county would distribute these funds.* I believe Congress intended the county be vested with total discretion in distributing section 1601 funds. While the county may choose to distribute part of the section 1601 funds to the school district, *see Kendall* v. *Towns County*, 146 Ga.App. 760, 247 S.E.2d 577 (1978), I do not believe the county can be forced to do so as contemplated by S.D.C.L. § 5-11-6. *By the passage of S.D.C.L. § 5-11-6, South Dakota was undermining the very intent and purpose of the Act by earmarking sixty percent of the funds for school districts.*

The majority opinion below relied heavily upon a finding that because expenditures on school districts is a "governmental purpose" that South Dakota could independently determine that the County must spend sixty percent of its Section One receipts on school districts. Appendix A *infra* p. 3a. While correct that expenditures on school districts may be one of many legitimate governmental purposes, *see supra* note 26, the court below should have analyzed the language "any governmental purpose" in the context of the whole Act, its purposes and the circumstances under which the language was employed, rather than in isolation. *See Kokoskza* v. *Belford*, 417 U.S. 642, 650 (1974); *District of Columbia* v. *Carter*, 409 U.S. 418, 420 (1973). A complete analysis would have shown that the state had no authority to determine for the County which of "any governmental purposes" were to be served by the Act's payments. *See also supra* note 35. South Dakota's tampering with the federal scheme and restriction on the County's discretion, whether or not the result the state statute achieves would have otherwise been permissible, is irrelevant. *See Jones* v. *Rath Packing Co.*, 430 U.S. at 540. It would be

inconsistent with federal policy if the state retained the power to determine whether the County could do what the Act authorizes the County to determine for itself. *See Chicago & North Western Transportation Co.*, 450 U.S. at 318. Accordingly, the South Dakota Supreme Court committed clear error in upholding the state's power to alter the federal regulatory scheme and its decision should be reversed.

6. Substantiality Of The Federal Interests.

The strong federal interest in distributing payments in lieu of taxes to units of local government is clearly demonstrated in the Act and in the Act's legislative history. The states could, however, unless the decision below is reversed, misdirect some or even all of every local government's payments contrary to express congressional purpose. For the period 1979-81, the County received approximately $400,000 under Section One of the Act. Appendix A *infra* p. 1a. In that same time period, all of the counties in South Dakota received $5.6 million under Section One of the Act. U.S. Dept. of Interior, *Payments In Lieu Of Taxes* fiscal years 1979, 1980 and 1981. Consistent with the decision below, South Dakota could divert all of these funds to "governmental" purposes the *state* determines are appropriate and in effect defeat the entire federal scheme. For example, South Dakota could legislate that 100 percent of the County's Section One payments would go to school districts. Because that forced expenditure would be for "a governmental purpose," the state scheme would stand on the authority of the decision below. The decision of the South Dakota Supreme Court could also be used as authority for other states to legislatively misdirect all or part of their local governments' payments under the Act. *See, e.g.*, Ark.Stat. Ann. § 80-726, *supra* note 9. This result is magnified by the total amount of federal payments under the Act which approaches $100 million annually. U.S. Dept. of Interior, *Payments In Lieu Of Taxes*, fiscal year 1982.

It is clear that the County was to determine free of state influence where to expend payments it received under the Act.

Congress had determined that there should be no restrictions on the County's use of the funds and the state cannot substitute its judgment as to the expenditure of these funds for that of Congress. *Hergenreter* v. *Hayden*, 295 F.Supp. at 255. In fact, the Act was designed in large part to ensure that Section One payments reach the units of local government for their expenditure because the states were not directing enough funds to the local governments under other statutes. The South Dakota statute would defeat the intended effect of the Act by unconstitutionally supplanting the scheme created by Congress and compromising congressional policy. *See Florida Lime & Avocado Growers*, 373 U.S. at 271 (White, J., dissenting). This complete reworking of a considered and express congressional plan should not stand.

CONCLUSION

The federal interests at stake are substantial. The South Dakota court's conclusion stands as the authority for the diversion and misdirection of more than $100 million annually from local governments to the objects of a state's largesse. Substantial federal interests have been sacrificed to uphold a state statute which not only touches upon an area of exclusive federal regulation, but which frustrates explicit congressional purpose. The South Dakota Supreme Court's failure to properly analyze the County's Supremacy Clause challenge and to void the South Dakota statute is a judgment which this court should summarily reverse. In the alternative, because of the importance of the Act in carrying out a salient federal policy, this Court should note probable jurisdiction and set the matter for full briefing and oral argument. *See American Commercial Lines, Inc.* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 574 (1968).

Respectfully submitted,

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Dated: August 15, 1983

APPENDIX A

SUPREME COURT OF SOUTH DAKOTA

334 N.W. 2d 24

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,
Plaintiff and Appellant,

v.

LAWRENCE COUNTY, and the Lawrence County Commissioners,
Defendants and Appellees.

No. 13982-r-JF.

Argued Feb. 16, 1983.
Decided May 18, 1983.

FOSHEIM, Chief Justice (on reassignment).

By Act of Congress, Lawrence County and the Lawrence County Commissioners (appellees) receive payment of federal money in lieu of taxes for federal entitlement lands located within Lawrence County. Act of October 20, 1976, Pub.L. No. 94-565, 90 Stat. 2662, 31 U.S.C. § 1601, et seq. These funds "may be used . . . for any governmental purpose." 31 U.S.C. § 1601.[1] SDCL 5-11-6 provides that "[t]he county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed." Under the Act, appellees have been the recipients of over $400,000. Under the

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[1] 31 U.S.C. § 1601: That effective for fiscal years beginning on and after October 1, 1976, the Secretary is authorized and directed to make payments on a fiscal year basis to each unit of local government in which entitlement lands (as defined in section 6) are located. Such payments may be used by such unit for any governmental purpose. The amount of such payments shall be computed as provided in section 2.

distribution in lieu of taxes ratio, Lead-Deadwood School District (appellant) would receive in excess of 60% of this payment. However, appellant has not shared in these funds because appellees refuse to honor the distribution provisions of SDCL 5-11-6. Appellant, in this mandamus action, seeks to compel appellees to distribute this money as prescribed by SDCL 5-11-6. Appellees' answer prayed for a denial of the writ, contending SDCL 5-11-6 is unconstitutional. The judgment of the trial court declared that SDCL 5-11-6 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under 31 U.S.C. § 1601 and as such [it] is unconstitutional and void under the supremacy clause of the federal and state constitutions."[2] The judgment also declared that appellees could "use all money received under the provisions of 31 U.S. Code § 1601 for any lawful purpose they see fit without regard to the provisions of SDCL 5-11-6." We reverse.

The only issue before us is whether SDCL 5-11-6 conflicts with 31 U.S.C. § 1601, and thus violates the supremacy clause.[3] Our inquiry is based on the assumption that absent the clear and manifest intent of Congress, the reserve powers of

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[2] U.S. Const. art. VI, cl. 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

S.D. Const. art. VI, § 26: All political power is inherent in the people, and all free government is founded on their authority, and is instituted for their equal protection and benefit, and they have the right in lawful and constituted methods to alter or reform their forms of government in such manner as they may think proper. And the state of South Dakota is an inseparable part of the American Union and the Constitution of the United States is the supreme law of the land.

[3] In Lawrence County, S.D. v. State of S.D., 668 F.2d 27 (1982), the United States Court of Appeals for the Eighth Circuit held that

the States are not superseded by federal legislation. *Chicago & N.W. Tr. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). However we recognize that

> [e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . .,' or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Ray, supra, 435 U.S. at 158, 98 S.Ct. at 994 (citations omitted). We must determine what Congress said about the distribution of the money, what South Dakota provides on the subject, and whether there is a conflict. *Chicago & N.W. Tr. Co., supra.*

Appellees would have us launch this inquiry with an examination of the legislative history of the Act. However resort to legislative history is justified only when legislation is ambiguous or its literal meaning is absurd or unreasonable. Absent these circumstances we must give legislation its plain meaning. We cannot amend it to produce or avoid a particular result. *Matter of Sales Tax Refund Applications*, 298 N.W.2d 799 (S.D. 1980); *Elfring* v. *Paterson*, 66 S.D. 458, 285 N.W. 443 (1939). In our view, the scriveners of 31 U.S.C. § 1601 wrote it in plain, clear and rational language. We therefore need not look to legislative history. By the plain words of 31 U.S.C. § 1601, the federal money distributed to appellees "may be used by such unit for any governmental purpose." SDCL 5-11-6 requires distribution of these federal payments as taxes are distributed and thus school districts are recipients. Support of school districts is a governmental purpose. Appellees receive

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the facts in this case did not present a question of federal court jurisdiction.

the federal money in lieu of taxes that the entitlement land would be subject to if it were not owned by the federal government. One such tax is a school tax. We find no conflict between the two laws. If Congress intended to prohibit § 1601 funds from going to school districts, it could have done so by writing that prohibition into § 1601. However the only restriction placed on these funds is that they be used for a governmental purpose, which it is under SDCL 5-11-6.

Appellees argue conversely that had Congress intended § 1601 money to go to school districts, it would have so specified, as it did in 31 U.S.C. § 1603. We are not persuaded by this argument. Section 1603 is a special part of the Act which provides for *additional* payments to counties to compensate them for loss of real property taxes on certain lands acquired by the federal government after December 31, 1970. Payment under this section continues for only five years. This is a special measure to relieve the impact on local governments' budgets when land is suddenly removed from their tax roles. Payment under this program is based on one percent of the fair market value and is paid to counties with direction that the money be prorated to local units of government and school districts. While the payment would not necessarily provide dollar for dollar tax equivalency, it provides a measure of temporary revenue relief while these localities adjust to the tax loss. We do not believe that by earmarking school districts as recipients of § 1603 funds Congress thereby manifested its intent to exclude them from § 1601 funds. We reiterate the assumption that Congress does not intend to supersede state legislation absent a clear manifestation of such an intention.

We conclude that it is feasible for appellees to comply with 31 U.S.C. § 1601 and SDCL 5-11-6 because SDCL 5-11-6 is in harmony with, and not an obstacle to, the fulfillment of 31 U.S.C. § 1601.

The judgment is reversed with direction to issue the writ of mandamus.

WOLLMAN and MORGAN, J.J., concur.

DUNN and HENDERSON, J.J., dissent.

DUNN, Justice (dissenting).

I would first define the exact issue before this court. Section 1601 funds can be distributed "for any governmental purpose" by the local taxing authority (county) receiving the money. Financing school districts is a governmental purpose and the county could allot part or all of the section 1601 funds to the school district under the Act. The question presented here is: Can the county be *mandated* to pay over sixty percent of section 1601 funds to the school districts by a *state statute?*

Section 1601 provides that the money be paid over to the local taxing authority to be used "for any governmental purpose." Unlike section 1603 of this Act,* section 1601 does not provide for the distribution of these funds for school districts. At the very least, the silence in section 1601 on this point, in contrast to section 1603 express provision, creates an ambiguity as to how section 1601 funds are to be distributed. When we turn to the legislative history of the Act, it becomes most apparent that section 1601 funds were not intended to be earmarked by the State or any other unit of government except the *local taxing authority (county)* receiving the money.

> The Senate Report on the Act states:
> [T]he Committee believes that payments under [the Act] should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these funds. The Committee does not believe that these new payments should be *re-*

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* Section 1603 discusses payments for certain lands and provides for proportional payments of the funds to local governments and affected school districts. Section 1603 of the Act provides, in pertinent part:

> The counties, under guidelines established by the Secretary, shall distribute the payments on a proportional basis to those units of local government and affected school districts which have incurred losses of real property taxes due to the acquisition of lands or interests therein for addition to either such system.

> *stricted or earmarked for use for specific purposes* and the bill allows these payments to be used for any governmental purpose. S.Rep.No. 1262, 94th Cong., 2d Sess. 15 (1976), U.S. Code Cong. & Admin.News 1976, p. 5968, 5978. (Emphasis supplied.)

Later in the report the Committee was even more explicit as to the State's interference in distributing the funds:

> Many of the revenue sharing provisions permit the States to make decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt. S.Rep. No. 1262, 94th Cong., 2d Sess. 9 (1976), U.S. Code Cong. & Admin.News 1976, p. 5972.

This statement makes it abundantly clear that Congress was directing the states to keep their noses out of the manner in which a county would distribute these funds. I believe Congress intended the county be vested with total discretion in distributing section 1601 funds. While the county may choose to distribute part of the section 1601 funds to the school district, *see Kendall* v. *Towns County*, 146 Ga.App. 760, 247 S.E.2d 577 (1978), I do not believe the county can be forced to do so as contemplated by SDCL 5-11-6. By the passage of SDCL 5-11-6, South Dakota was undermining the very intent and purpose of the Act by earmarking sixty percent of the funds for school districts.

The United States Supreme Court noted in *Chicago & N.W. Tr. Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258, 265 (1981):

> [W]hen Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law preempted by federal regulation whenever the "challenged state statute 'stands as an obstacle to the accom-

> plishment and execution of the full purposes and objectives of Congress.' "

Since SDCL 5-11-6 undermined the accomplishment and execution of the full purposes and objectives of Congress by earmarking funds for school districts, I would find SDCL 5-11-6 unconstitutional as far as section 1601 payments are concerned. I would affirm.

I am authorized to state that Justice HENDERSON joins in this dissent.

APPENDIX B

IN CIRCUIT COURT
EIGHTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
) S.S.
COUNTY OF LAWRENCE)

LEAD-DEADWOOD SCHOOL DISTRICT No. 40-1,
Plaintiff,

v.

LAWRENCE COUNTY, and the
LAWRENCE COUNTY COMMISSIONERS,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come before this Court on Briefs submitted by counsel of record, and the Court having examined the proofs in support thereof, the Court finds the fact as follows:

FINDINGS OF FACT

I.

That Plaintiff has sought a Writ of Mandamus for immediate disbursal of monies received by Defendant under the provisions of 31 U.S. Code 1601.

II.

That Defendants have answered and counterclaimed Plaintiff's Complaint and sought a declaration that SDCL 5-11-6 is unconstitutional in that the same is in conflict with 31 U.S.C. 1601 et seq.

III.

That the attorney General of the State of South Dakota has been notified pursuant to SDCL 21-24-8 of the constitutional attack on the statute.

IV.

That Lawrence County is a recipient county for the receipt of monies under Public Law 94-565 (31 U.S.C. Sec. 1601-1607).

V.

That Lawrence County received during the calendar year 1979 the sum of $134,627.00 under Public Law 94-565. Lawrence County received during the calendar year 1980 the sum of $110,370.00 under Public Law 94-565. Lawrence County received further payment in 1981 the sum of which is not known, under Public Law 94-565.

VI.

That Lawrence County has retained all of said sums of money and has not disbursed any monies paid under Public Law 94-565 to the above named Plaintiff under SDCL 5-11-6.

VII.

That Public Law 94-565 (31 U.S.C. 1601-1607) was duly passed by the United States Congress October 10, 1976.

VIII.

That SDCL 5-11-6, as amended, was duly passed by the South Dakota Legislature and was effective July 1, 1979.

IX.

That SDCL mandates that a portion of revenues received by Lawrence County be disbursed by said County into Meade School District 46-1 in Meade County, South Dakota.

X.

That SDCL 5-11-6 would result in excess of 60% of monies received by Lawrence County being disbursed to various school districts including Plaintiff.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the matter.

II.

That SDCL 5-11-6 is in conflict with and stands as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress and as such is unconstitutional and void under the supremacy clause of the federal and state constitutions.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated this 27th day of September, 1982.

BY THE COURT:

/s/ Scott C. Moses

SCOTT C. MOSES
Presiding Judge
Eighth Judicial Circuit Court

(SEAL)

ATTEST:

Clerk of Courts
Lawrence County, South Dakota

IN CIRCUIT COURT
EIGHTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
)
COUNTY OF LAWRENCE) S.S.

LEAD-DEADWOOD SCHOOL DISTRICT No. 40-1,
Plaintiff,

v.

LAWRENCE COUNTY, and the
LAWRENCE COUNTY COMMISSIONERS,
Defendants.

JUDGMENT

The above entitled matter having come on before this Court, the Honorable Scott C. Moses presiding, on Stipulation of Fact, and the parties having briefed the same, and the Court having entered it's Memorandum Opinion, dated September 9, 1982, and Findings of Fact and Conclusions of Law having been submitted to this Court and signed by this Court on this date,

IT IS HEREIN THE JUDGMENT OF THIS COURT, That SDCL 5-11-6 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under 31 U.S.C. 1601 and as such that SDCL 5-11-6 is unconstitutional and void under the supremacy clause of the federal and state constitutions.

IT IS THE FURTHER JUDGMENT OF THIS COURT, That Lawrence County is herein permitted to use all money received under the provisions of 31 U.S. Code 1601 for any

lawful purpose they see fit without regard to the provisions of SDCL 5-11-6.

Dated this 27th day of September, 1982.

BY THE COURT:

/s/ Scott C. Moses

SCOTT C. MOSES
Presiding Judge
Eighth Judicial Circuit Court

(SEAL)

ATTEST:

/s/ B. C. Edstrom

B. C. EDSTROM
Clerk of Courts
Lawrence County, South Dakota

By:

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Case No. 13982

LEAD-DEADWOOD SCHOOL DISTRICT, No. 40-1,
Plaintiff and Appellant,

v.

LAWRENCE COUNTY, and the
LAWRENCE COUNTY COMMISSIONERS,
Defendants and Appellees.

NOTICE OF APPEAL

Please take notice that Lawrence County and the Lawrence County Commissioners hereby appeal the decision rendered by this Court on May 18, 1983 to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2). Dated this 18th day of July, 1983.

/s/ Alan Raywid

ALAN RAYWID

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SUPREME COURT
STATE OF SOUTH DAKOTA
Original was FILED
JUL 22 1983
Gloria A. Engel
Clerk

APPENDIX D

LEGISLATIVE HISTORY OF THE PAYMENTS IN LIEU OF TAXES ACT

I. Committee Reports

A. Excerpts from S.Rep. No. 94-1262, 94th Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Ad. News 5968 ("S.Rep. No. 1262") accompanying and recommending passage of the Payments In Lieu of Taxes Act.

Introduction And Background On The Policy Supporting Payments In Lieu Of Taxes To Local Governments, S.Rep. No. 1262 at 5-6 (footnote omitted):

. . . [T]he Commission also recommended that, if the historic policy of disposal of the public lands is to be reversed and those lands are to be retained in Federal ownership, "it is the obligation of the United States to make certain that the burden of that policy is spread among all the people of the United States and is not borne only by those states and goverments in whose area the lands are located. Therefore, the Federal Government should make payments to compensate state and local governments for the tax immunity of Federal lands."

H.R. 9719, as reported, seeks to translate the basic principle of this PLLRC recommendation into law. Its purpose is to recognize the burden imposed by the tax immunity of Federal lands by providing minimum Federal payments to units of local government within the boundaries of which these lands lie. The Act establishes a formula for determining such payments which sets both a floor and a ceiling thereon. The formula is a relatively simple one which can be employed with a minimum of administrative costs.

Background

1. Defects in Existing Statutes Providing for the Sharing of Revenues and Fees from Public Lands with State and Local Governments.

The Federal Government owns over 761 million acres of land within the United States, of which some 705 million acres remain from the original public domain and 56 million have been acquired from private or other public owners. These vast Federal landholdings comprise approximately one third of all the land in this country. Although the greatest portion of these lands is situated in the eleven coterminous Western states and Alaska, 40 states and approximately 1000 counties have federally owned tax exempt land within their boundaries.

* * *

Defects in Current Federal Payments Schemes To State Governments, S.Rep. No. 1262 at 7-10:

In this Congress, the Senate has made numerous efforts to amend [ ] statutory provisions to increase the amount of, and render more useful, the payments to State and local governments . . .

No reform of these statutory provisions, however, will cure the eight basic defects of this Federal lands revenue and fee sharing system:

1. Payments under this system are made only for those lands which have revenue or permit fee generating activities occurring on them . . .

2. Even once a level of production is established, State and local governments cannot budget public lands revenue and fee sharing funds with any degree of certainty, because management decisions of the various Federal land management agencies can often quite suddenly reduce or eliminate the revenue or fee generating activities on the public lands within those State or local governments' jurisdictions. . . .

3. Certain Federal lands . . . are prohibited by law from supporting any of the activities which generate revenues or fees which are shared with State and local governments, and other lands may support only one or a few of those activities. . . . These lands attract thousands of visitors each year, yet the intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands.

4. The percentages of revenues and fees shared under the various provisions of law are not based on any rational criteria. As a result they vary from 5 to 90 percent, depending on the program and agency involved.

5. Even in the few instances when a local government's share of the various revenues and fees is sufficient to meet service demands arising from the Federal lands and to approximate the loss of ad valorem tax revenues which would otherwise be generated by those lands, too many of the revenue sharing provisions restrict the use of funds to only a few governmental services — most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

6. *Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the*

funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generated activities are felt . . .

8. Most importantly, the total of funds received by most local governments under the Federal lands revenue and fee sharing statutes seldom approaches (i) the level of revenues which would be collected by ad valorem taxes were these lands private lands or (ii) the level of expenditures of the local governments to construct facilities and provide services required by activities on the Federal lands or by activities on private lands which have been generated by the Federal lands activities . . . (emphasis supplied)

* * *

Burdens Of Providing Services for Federal Lands, S.Rep. No. 1262 at 13-14:

The designation of lands as national parks and wilderness areas precludes any mineral or timber revenues, yet the tax immunity of these lands is no less of a burden for local jurisdictions than multiple-use national forest and BLM lands. States and local governments do not now receive any compensation for the tax immunity of these lands other than the unquantified and indirect benefits from visitors and tourists. In numerous hearings before the Committee local and State officials have testified to the increasing fiscal demands for governmental services in these areas. While the Committee does not discount the fact that some benefits accrue to localities where national parks, monuments and wilderness areas are located, the revenues produced for the local community do not match the burdens of providing additional police and fire protection, search and rescue service, medical and hospital facilities, and other governmental responsibilities required in and around these areas because of the influx of visitors . . .

Federal lands eligible for payments in lieu of taxes were designated "entitlement lands" in section 6 of the bill because they are believed to have the greatest impact on the fiscal health of units of local government and create the vast majority of the problems related to the tax immunity of Federal lands.

* * *

Intended Lack Of Restrictions On Payments Directly To Units Of Local Government, S.Rep. No. 1262 at 15:

H.R. 9719 requires that any payments under the ten statutes set forth in section 4 which are actually received by a unit of local government are to be deducted from H.R. 9719's payments. In most cases only a small percentage of mineral leasing revenues produced within a county are returned to that county by the State. Accordingly, to preclude penalizing these counties, H.R. 9719 provides that only those monies actually received by local government should be deducted.

Moreover, the Committee believes that payments under H.R. 9719 should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose.

* * *

Policy Behind Section Three Payments, S.Rep. No. 1262 at 18:

Payments authorized by this subsection will be made to counties, with the counties responsible for distributing the payments on a proportional basis to those units of local government and affected school districts which have incurred losses of real property taxes due to the acquisition of these lands or interests by the Federal government. The Secretary would establish guidelines for this distribution, but the basic determination would be left to the counties—and thus to local rather than Federal control.

B. H.R.Rep. No. 1106, 94th Cong., 2d Sess. ("H.R.Rep. No. 1106") accompanying and recommending passage of the Payments In Lieu of Taxes Act.

Purpose and Policy Supporting Federal Payments In Lieu Of Taxes, H.R.Rep. No. 1106 at 4-5:

. . . [I]f the historic policy of disposal of the lands is to be reversed, and thus forever keep such lands off the tax rolls of the States and counties, a system of payments in lieu of taxes should be established to compensate these units of government for the burdens resulting from the tax immunity of the public lands. In other words, if the lands were to be retained for all the people of the United States, the expense of retaining them ought to be borne by all of the citizens rather than only by those who live within the boundaries of the States and counties where the public lands lie.

. . . [The] purpose [of H.R. 9719] is to recognize the burden imposed by the tax immunity of Federal lands by providing minimum Federal payments to units of local government in which these lands lie. The bill establishes a formula for payments and provides a floor and a ceiling for payments to such units of government based on the population and number of acres of lands eligible under the basic philosophy of the bill.

* * *

Inadequacy of Current Provisions To Reimburse Local Governments From The Costs of Providing Services For Federal Lands, H.R. Rep. No. 1106 at 5-7:

Over the years, the Congress has established programs to partially compenate states and local governments for the impact of Federal ownership, but in most cases the revenues that they receive do not approach what would be received from property taxes if these lands were in private ownership . . .

Most of the present payments bear no relationship to the direct and indirect burdens imposed on local governments by the presence and/or use of these Federal lands. Nor are the

revenues a unit of government receives directly related to the total number of acres of Federal land.

Moreover, these public land payments have not kept pace with the increasing demands for governmental services. . . .

In addition, there are currently no payments to states and local governments for the 24.8 million acres in the National Park System or the 9.6 million acre National Wilderness System. These lands attract thousands of visitors each year, yet the intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the state treasury, yet it is the local governments that must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activity on these lands. . . .

The present system of shared receipts bears no relationship to the direct or indirect burdens placed on local governments by the presence of Federal lands. Most current payments are restricted to use for construction and maintenance of schools or roads. Yet, local governments provide many additional services such as law enforcement, search, rescue and emergency services, public health, sewage disposal, library, hospital, recreation, and other general local government responsibilities. . . .

The situation is similar in county after county across the country: the Federal government as landowner does not pay what would be required if this land was on the tax rolls; nor does it adequately compensate counties for the burdens associated with the maintenance of local government services on these lands.

* * *

The Inequities of Restrictions on Current Federal Payments To Local Governments, H.R. Rep. No. 1106 at 8-10:

Under these statutes, anywhere from 5 percent to 90 percent of revenue produced is returned to the States and counties, earmarked for schools, roads or other specific purposes. Most of these statutes were enacted before or without regard to local government tax structures and do not reflect current actual revenue needs or tax losses . . .

The Committee believes, however, that even these counties do not receive payments which are equal to tax equivalency or which reflect the burden of providing services. Moreover, these payments are restricted by statute to use for schools and roads at a time when demands for innumerable other governmental services continue to increase—services and responsibilities not generally provided by local governments when these statutes were enacted . . .

The designation of lands as national parks and wilderness areas precludes any mineral, grazing or timber revenues, yet the tax immunity of these lands is no less of a burden for local jurisdictions than national forests or BLM land. States and local government do not now receive any compensation for the tax immunity of these lands other than the unquantified and indirect benefits from visitors and tourists. Testimony from local and State officials documented the increasing fiscal demands for governmental services in these areas. While the Committee does not discount the fact that some benefits accrue to localities where national parks, monuments and wilderness areas are located, the revenue produced for the local community does not match the burdens of providing additional police and fire protection, search and rescue service, medical and hospital facilities, and other governmental responsibilities required in and around these areas because of the influx of visitors.

* * *

The Purpose and Policy Of Section Three Payments, H.R. Rep. No. 1106 at 11:

To ease the impact of such a Federal acquisition, the Committee approved an amendment to reduce the burden imposed by the sudden loss of this tax base by compensating units of

local government for a five-year period at the rate of 1 percent of the fair market value of the acquired lands. . . .

The intent of section 3 is to equalize the fiscal burden caused by the acquisition of private lands for new parks and wilderness areas and to reduce the immediate and direct financial impact on the affected local jurisdiction. This burden is often cited as the most important source of opposition to the establishment of new parks where land, however valuable to our national heritage, is now on the tax rolls and producing revenue.

* * *

The Rationale For Directing Payments To Local Governments And Not States Or Special Purpose Districts, H.R. Rep. No. 1106 at 11-12:

Under existing programs for sharing public land revenues, the Federal government returns a percentage of revenues to the States, which are then distributed to state and local governments according to State law and the requirements of the Federal statutes . . .

. . . The Committee realized that in most cases only a small percentage of mineral leasing revenues produced within a county are returned to that county by the State, and to preclude penalizing these counties the Committee determined that only those monies actually received by the local government should be deducted.

Moreover, the Committee believes that payments under H.R. 9719 should go directly to units of local government since it is the local governments that assume the burden for the tax immunity of these lands. The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose.

It is the general purpose local governments which are the taxing authorities and the units responsible for providing services and which should be the recipients of these payments . . .

The definition of "unit of local government" assures that counties, cities, towns, and townships, existing boroughs in Alaska, parishes and other units of local government that have general governmental responsibilities, as opposed to single purpose functions such as school districts and water districts, will be the recipients of these payments.

II. Congressional Debates

Selected excerpts from the debate and statements of members of the House of Representatives upon consideration and passage of the Payments in Lieu of Taxes Act, H.R. 9719, appearing in 122 Cong. Rec. 25741-78 (August 5, 1976). All of the Congressmen, including the Bill's sponsors, commented on the current inequitable situation facing local governments with federal tax-exempt lands in their boundaries.

Statement of Congressman Quillen, on the background of the Act and lack of restriction on local governments' discretion, 122 Cong. Rec. 25742:

The Federal Government owns over 760 million acres of the 2.2 billion acres in the United States. These Federal holdings amount to approximately one-third of all our land, and are contained in over 1,000 counties, . . .

* * *

The tax immunity of these Federal lands substantially reduces the tax base of these counties, and other affected counties throughout the country, and places an unfair tax burden on the local taxpayers. Over the years, the Congress has established various programs to partially compensate States and local governments for the tax loss impact of Federal land ownership within their boundaries.

* * *

The present system of payments, most of which go to the State governments, bears no relationship to the direct and indirect financial burdens placed on the local governments by

the presence of these Federal lands. The local governments must provide the full range of community services including road maintenance, law enforcement, court systems, fire protection, rescue operations, health, welfare, and other necessary services—despite the fact that large areas of these counties are Federal land and are therefore removed from the local tax rolls.

* * *

H.R. 9719 provides that the payments shall go directly to the units of local government. The funds are not earmarked for specific purposes such as roads or schools. Rather, the local governments are given the discretion to use these monies as they determine, which is as it should be.

Statement of Congressman Weaver, noting the unique burdens associated with federal land and the inequities of prior payment systems, 122 Cong. Rec. 25747:

Over the years Congress has established a number of programs which partially compensate for the impact of Federal ownership by paying a percentage of the revenue derived from the public lands but these forest receipts, grazing fees, and other revenues, are considerably less than the revenues these lands would provide to the counties if on the tax rolls.

* * *

Of the more than $750 million in receipts annually from these lands—and I point out these lands now give to the Federal Government $750 million annually in various production receipts—they return only $115 million to the local governments in these sharing formulas. These are earmarked for roads and schools, not to the counties directly. These payments do not bear any relationship to the direct and indirect burdens imposed on local governments to provide a host of governmental services to these lands, such as the ones I have mentioned including fire protection, sewage treatment, the pickup of litter, courts, health, search and rescue, and law enforcement, to name a few. The existing system is extremely inequitable

and the revenue fluctuates from year to year depending entirely on production. H.R. 9719 would provide a predictable level of payments which does not now exist that the counties could rely on.

Statement of Congressman Jeffords, noting the general scheme of payments to local governments, 122 Cong. Rec. 25748:

[The Payments in Lieu of Taxes Act] . . . addresses a problem that has plagued substantial portions of almost all our States—that of the inadequate compensation local units of government receive for certain Federal lands located within their boundaries. Tax-exempt tracts managed by the Forest Service, Bureau of Land Management, and National Park Service have long placed severe strains on the property tax base of many counties and towns.

* * *

I feel that H.R. 9719 represents a significant move toward providing equitable levels of payment to local governments strapped by the tax-exempt status of Federal lands within their boundaries. Instead of basing Federal payments on the vagaries of the timber market, it establishes a uniform pricing mechanism providing a stable and adequate level of return. The bill provides these monies

Statement of Congressman Evans, noting the costs of services for federal lands and lack of restrictions on use of payments under the Act, 122 Cong. Rec. 25749-50:

The current Public land sharing formulas for timber, minerals, grazing leases, et cetera, do not provide sufficient funds to local governments.

The local governments have to provide services such as road maintenance, fire protection, law enforcement, waste disposal, health and rescue operations, courts, et cetera, for the public lands and activities on the lands, thereby placing an unfair burden on the taxpayers of the counties in which these lands are held. Of more than $750 million in receipts annually

from these lands only about $110 million is returned to local governments which is principally earmarked for roads and schools.

* * *

Under H.R. 9719, a local government would receive the greater amount of either: First, 75 cents per acre of entitlement lands; or second, 10 cents per acre in addition to current payments. These payments would be limited to $50 per capita for counties under 5,000 population with a sliding scale of $20 per capita at 50,000 population or above. The payments can be used for any local government purpose—not restricted to roads and schools.

Statement of Congressman Baucus, stressing the lack of restriction on counties' use of payments under the Act, 122 Cong. Rec. 25750:

There are approximately 1,000 counties in over 40 States which hold tax-exempt lands. This federally owned land contributes to operating costs for local governments. Adequate police and fire protection, medical care, ambulance service and road maintenance must be provided by the counties for people using these public lands. Yet, these counties cannot increase taxes on these lands to provide these services because these lands are tax exempt.

The current formula payments from public lands do not accomplish tax equity. Current payments are restricted to roads and schools only and current payments are based entirely on the amount of production of the public lands. Therefore, many public land based counties receive virtually no payments.

* * *

This bill treats all counties fairly. The payment formula is simple and easy to understand. It does not change existing law in any way. It does not jeopardize any Federal payments now received by counties. And payments can be used by counties for any public purpose.

Statement of Congressman Alexander, noting the inequities in prior payment plans, 122 Cong. Rec. 25752:

. . . [A]s a sponsor of H.R. 9719, I rise in support of the Payment In Lieu Of Taxes Act, a bill which I believe will give rightful compensation to those counties in this Nation that suffer from a loss of revenues due to federally owned, and therefore non-taxable, lands within their boundaries.

* * *

The flaws in the current compensation programs are many. Most of the present payments bear no relationship to the direct and indirect burdens placed on local governments by the presence and use of these Federal lands. Nor are the revenues that a local unit of government receives directly related to the total number of acres of Federal land. And, probably most importantly to the people who reside within these local jurisdictions, these public land payments have not kept pace with the demand for Government services.

While there are programs for partial compensation to State and local governments for these lands, there are currently no payments to States and local governments for the 24.8 million acres in the national park system or the 9.6 acre national wilderness system. These lands attract scores of visitors, but the economic benefits to the local economy rarely accrue to the local taxing authority. Income and sale taxes accrue to the State coffers, yet it is the local unit of government that must provide law enforcement, road maintenance, health and other services.

Statement of Congressman Johnson, noting the special costs to local governments of supporting federal lands, 122 Cong. Rec. 25753:

. . . The counties that really need the funding are counties that have a lack of sewer facilities, water facilities; they have high road expenses during the winter and during the summer

time when they have a high number of tourists and we seem to be getting more tourists all the time.

* * *

This is a bill that will provide some help and some compensation for the inevitable expense that arises out of trying to maintain that population that keeps coming through in these concentrated periods of time. It is something which is justified.

Statement of Congressman McCormack, on the inequities of the prior system of payments and lack of restrictions on those under the Act, 122 Cong. Rec. 25754:

. . . These recreation and wilderness areas were created by Federal statute—for the benefit of all the people of this Nation, but at the expense of the local government and people.

* * *

Many counties now obtain some returns from these leases, based on a percentage of production, for expenditure on schools and roads. The Payments-In-Lieu of Taxes Act will now assure the counties a definite amount that will not fluctuate with lease production abilities and will not be specifically earmarked for schools and roads but can be expended on the basis of priority need so that each county can now budget accurately, and the citizens of the county need not bear a disproportionate share of the tax burden for land intended for the use and enjoyment by all Americans.

Statement of Congressman McFall, on the special costs of maintaining federal lands and need for unrestricted use of payments by local government, 122 Cong. Rec. 25756:

The Federal Government owns approximately 800 million acres of the land in our Nation—approximately one-third of the total area of the United States. These lands, because of the sovereignty of the Federal Government, are exempt from State and local taxes.

Although the Congress has enacted various laws providing for some compensation to State and local governments for these lands, there remains a burden upon local governments to provide services—especially in recreational areas—for the millions of people who flock there.

* * *

Some money is returned to the counties from sales of timber in national forests. However, this return is based on net receipts and severe fluctuations in the net make sound county budgeting almost impossible. (Net receipts are limited for school and road budgets under a 50-50 split formula.)

* * *

As host counties for this vast playground, we are increasingly burdened with policing costs as crime and vandalism spreads. We are also burdened with the costs of handling garbage and litter for visitors as well as our own citizens in compliance with State and Federal mandates at great costs to our taxpayers.

* * *

H.R. 9719 will help to meet the burden these local governments bear for having these large tracts of Federal lands, and better enable them to meet their general government needs as well as those generated by the millions of people who come to these areas each year for recreation.

* * *

Statement of Congressman Seiberling, on the meaning of Section Three of the Act providing special additional compensation to school districts, 122 Cong. Rec. 27557-58:

Mr. Chairman, this bill would provide an equitable and easily administered means of partially compensating counties and local governments for the tax immunity of federally owned natural resource lands within their boundaries.

As the author of section 3 of the bill, it was my intention that school districts which suffer such losses would qualify for payments along with other units of local government. However, it has come to my attention that, because of the way the provision was drafted, it might be argued that a school district is not a unit of local government.

In order to eliminate any doubt about it, at the appropriate time I intend to offer a technical amendment to H.R. 9719, to expressly include school districts as qualifying for payments under section 3. The amendment would not add one cent to the cost of the provision, since the total amount would remain the same—1 percent of the fair market value of the acquired land for 5 years. The payments would still go to the counties or other comparable taxing unit, for distribution on a proportional basis to the affected local unit of government and school districts.

* * *

While the purpose of section 3 is to cushion the effect on communities of sudden tax losses, it must be recognized that some added expenses for localities do continue indefinitely—and usually increase with increased tourism. The local governments must maintain their roads to carry increased traffic going to and from the parks. They must also provide for added law enforcement, hospitals, and other services which are related, directly or indirectly, to activity in the parks.

Furthermore, while local businesses may indeed gain added income from tourists, often the local governments do not gain greatly increased revenues from sales and income taxes which go to the treasuries of the States.

Statement of Congressman Fithian, on lack of restriction on the use of payments under the Act, 122 Cong. Rec. 25760:

. . . [T]here is presently no method of reimbursement to communities for wilderness areas and other non-revenue-producing lands that can, and sometimes do, take quite a chunk out of a local tax base.

* * *

This bill authorizes the Secretary of the Interior to compensate localities for land in their tax jurisdictions included in national parks. If two taxing jurisdictions overlap, the smaller unit of government would receive the funds. Funds may be used for any governmental purpose, without qualification.

Statement of Congressman Robinson, on reimbursing local governments, 122 Cong. Rec. 25762:

I think it particularly desirable that this bill emphasizes payments to units of local governments, because it is their revenue base which is affected most directly, and adversely, by the exemption of the Federal lands from real property taxes.

Statement of Congressman Clausen, noting the lack of compensation to local governments by states for indirect income received from national park lands, 122 Cong. Rec. 25772-73:

It is true that in some cases national parks are a "gold mine" to the surrounding communities. However in many cases the opposite is true.

Visitors and tourists provide some benefits but they are indirect and may vary from year to year. For example, increased income from tourist-related businesses may result in added tax revenue to the State in the form of sales tax and income tax revenues but does not compensate our local jurisdictions for the loss of property taxes.

At the same time, the administration of the parks require that our local communities provide services such as police and fire protection, search and rescue service, medical and hospital facilities. The same is true of potential court costs associated with visitors to the public lands who get into trouble. The cost of providing these services is a tremendous burden on our local areas and they receive nothing in the way of compensation from the Federal Government. Our bill will correct this inequity by including parks among those lands to be considered for payment-in-lieu-of-taxes.

APPENDIX E

Legislative History of 1983 Amendments To Payments In Lieu Of Taxes Act.

I. Text Of Amendment

H.R. 3069, 98th Cong., 1st Sess., Amending 31 U.S.C. § 6901(2).

CHAPTER VII
DEPARTMENT OF THE INTERIOR
Bureau of Land Management

PAYMENTS IN LIEU OF TAXES—*(Amendment No. 88)*

Notwithstanding any other provision of law: (1) 31 U.S.C. 6901(2) is amended to read as follows:

"(2) 'unit of general local government' means:

(A) a county (or parish), township, borough existing in Alaska on October 20, 1976, or city where the city is independent of any other unit of general local government, that (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term 'governmental services' includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation, and governmental administration;

(B) the District of Columbia;
(C) the Commonwealth of Puerto Rico;
(D) Guam; and
(E) the Virgin Islands."

(2) Section 6903(a)(4) is repealed.

(3) The United States shall not be subject to any cause of action or any liability for distribution of payments made

prior to January 1, 1983, under the Act of October 20, 1976 (90 Stat. 2662), as amended, or regulations pursuant thereto . . .

II. Congressional Debate

Statement of Senator Durenberger on his amendment to H.R. 3069 adding 31 U.S.C. § 6907, stating its purpose to correct the decision in *Mead Township* v. *Andrus*, 695 F.2d 1006 (6th Cir. 1982) and that special districts are not eligible to receive payments under Section One of the Act, appearing in 129 Cong. Rec. S8444 (daily ed. June 15, 1983) (emphasis supplied):

* * *

Mr. President, chapter VII of this bill contains language reported out of the Energy and Natural Resources Committee in H.R. 1213. It amends the Payments In Lieu Of Taxes Act of 1976 which compensates local governments for the presence of Federal tax exempt lands within their boundaries. The effect of the language is to set aside a recent U.S. circuit court of appeals decision, Meade Township, and others against Andrus in which the court held the Secretary of Interior had exceeded his authority under the act in allocating payments in lieu of taxes to local governments.

The provision of H.R. 3069 at issue here would permit the Secretary of Interior to continue to allocate funds as he has in the past. The report accompanying H.R. 1213 explains the committee's opinion that this change is necessary to ensure the timely payment of entitlements under the act.

The amendment I am proposing is very simple. It would permit the payment in lieu of taxes funds to continue to go out exactly as they have since the beginning of the program with one slight change. The amendment would allow a State to pass a law, if it so desired, to reallocate the funds within the unit of government receiving the funds between that unit and other units of local government contained within it. If the State decides to reallocate the funds, all of the funds reallocated must

remain within the boundaries of the unit of government to which the Secretary originally made the allocation.

* * *

Mr. President, although there is not a lot of money at stake here, this is the essence of the New Federalism debate. At issue here is a dispute between two types of local governments in a few States over who provides the majority of the services. Congress should not be in the businss of settling these disputes. We have an obligation to see to it that money is provided in compensation for the presence of tax exempt Federal property. It is ridiculous for Congress to attempt to tailor a Federal program to take account the thousands of idiosyncratic ways local governments throughout the Nation provide public services. But, Mr. President, it is just as ridiculous for Congress to pretend these differences do not exist and to apply a uniform national standard simply for the sake of bureaucratic expediency.

Let me reiterate that if the State does not pass a law reallocating funds, the Secretary of Interior's allocation will stand. And if the State decides in its wisdom to reallocate the money, it must be redistributed only to local governments within the boundaries of the original recipient. *Furthermore, only general purpose local governments as defined by the Bureau of the Census will be eligible to receive funds under the reallocation—that is, only those jurisdictions currently eligible to receive general revenue sharing. Special districts will not be eligible unless the eligible jurisdictions negotiate an agreement with such districts as is currently the case in a few instances.*

Statement of Senator McClure, author of an earlier and similar amendment to the Payments In Lieu Of Taxes Act, supporting and explaining the Durenberger amendment. 129 Cong. Rec. S8444-45 (daily ed. June 15, 1983).

Mr. President, I support this amendment. It is a modification of the amendment which I offered in the committee that deals with the payment in lieu of taxes program.

The need for this amendment lies in the implementation of the original [Payments In Lieu Of Taxes Act] which was designed to provide revenues to that smallest unit of local government which provides general public services.

In the original administration of the act, the Department of the Interior wrote regulations and adopted definitions which resulted in the payments going to countries[sic] or their equivalents in almost every instance.

The townships in Michigan, among others, felt offended and brought suit. The court said that the regulations which had been adopted by the Department of the Interior were inappropriate. This cast a great deal of doubt on the payment in lieu of taxes program, and would have almost certainly meant that no further payments would have been made until that litigation was finally resolved. It would have also made a tremendous hiatus with respect to the status of payments that had been made under the program since the program began.

As the author of the PILT amendments in the first instance, I can say it was our intention that we create a stream of revenue that would act, in effect, as a substitute for the taxes that would have been generated upon property otherwise subject to taxation. That stream of revenues would go to the unit of government closest to that land that would have normally received those revenues under an ad valorem taxation scheme.

* * *

The amendment offered by the Senator from Minnesota solves that problem by saying that the State legislature must make that determination. If the State statute complies with the requirement that the lands be within the unit of government which provides that service and the revenues go to that unit of government which provides general public services in the areas where the lands are located, then the State will receive a lump sum payment. The State makes the distribution, and the State carries the administrative expense.

III. Text Of Final Amendment As Passed And Signed And Conference Committee Report

Amendment No. 89 to the Payments In Lieu Of Taxes Act adding new 31 U.S.C. § 6907 with conference committee report explanation. 129 Cong. Rec. H5367 (daily ed. July 2[illegible], 1983) (emphasis supplied):

(4) a new section 6907 is added as follows:

(a) Notwithstanding any other provision of this chapter, a State may enact legislation which requires that any payments which would be made to units of general local government pursuant to this chapter be reallocated and redistributed in whole or part to other smaller units of general purpose government which (1) are located within the boundaries of the larger unit of general local government, (2) provide general governmental services and (3) contain entitlement lands within their boundaries.

Such reallocation or redistribution shall generally reflect the level of services provided by, and the number of entitlement acres within, the smaller unit of general local government.

(b) Upon enactment of legislation by a State, described in subsection (a), the Secretary shall make one payment to such State equaling the aggregate amount of payments which he otherwise would have made to units of general local government within such State pursuant to this chapter. It shall be the responsibility of such State to make any further distribution of the payment pursuant to subsection (a).

Such redistribution shall be made within 30 days after receipt of such payment. No payment, or portion thereof, made by the Secretary shall be used by any State for the administration of this subsection or subsection (a).

(c) Appropriations made for payments in lieu of taxes for a fiscal year may be used to correct underpayments in the previous fiscal year to achieve equity among all qualified recipients.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

This amendment permits states, upon their enactment of legislation, to reallocate PILT payments to units of local governments which provide general governmental service and contain entitlement lands within their boundaries. It also permits appropriations to be used to correct underpayments made in the prior fiscal year.

* * *

Signed by the President on July 30, 1983, Pub.L. 98-63, 129 Cong. Rec. D1095 (daily ed. August 1, 1983).

Office-Supreme Court, U.S.
FILED
NOV 10 1983
ALEXANDER L. STEVAS,
CLERK

83-240

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE
LAWRENCE COUNTY COMMISSIONERS, *Appellants*

vs.

LEAD-DEADWOOD SCHOOL
DISTRICT NO. 40-1, *Appellee*

On Appeal From The Supreme Court
Of The State of South Dakota

MOTION TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS THE APPEAL

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November 8, 1983

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Supremacy Clause of the United States Constitution voids the South Dakota statute which distributes federal funds paid to Lawrence County by the Payments in Lieu of Taxes Act.

PARTIES TO THE PROCEEDINGS BELOW

Lead-Deadwood School District No. 40-1 was the Plaintiff in the trial court and the Appellant in the Supreme Court of South Dakota.

Lawrence County and the Lawrence County Commissioners were Defendants in the trial court and Appellees in the Supreme Court of South Dakota.

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IN THE
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OCTOBER TERM, 1983

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LAWRENCE COUNTY AND THE
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vs.

LEAD-DEADWOOD SCHOOL
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**On Appeal From The Supreme Court
Of The State of South Dakota**

MOTION TO AFFIRM THE DECISION OF THE SUPREME COURT OF SOUTH DAKOTA OR OR IN THE ALTERNATIVE TO DISMISS THE APPEAL

Lead-Deadwood School District will accept those portions of Appellant's Jurisdictional Statement entitled OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED and STATEMENT OF THE CASE.

REASONS FOR DISMISSING THIS APPEAL OR IN THE ALTERNATIVE FOR AFFIRMING THE SUPREME COURT OF SOUTH DAKOTA'S DECISION

At the outset it must be stated, as it has in all the previous courts, that the Lead-Deadwood School District does *not* dispute that the payments under 31 USC 1601-1607 are to be made to Lawrence County. The Court must clearly under-Stand that the Lead-Deadwood School District believes that Lawrence County is the proper recipient of the payments made under the Payment in Lieu of Taxes Act, 31 USC Sections 1601-1607.

1. Supremacy Clause

The Supremacy Clause is a very practical and necessary part of the United States Constitution. Although rather simple in wording, the exact meaning of this clause has raised many questions. These questions began even before the Constitution was adopted. To allay fears about the potential abuse within the words of this phrase, Alexander Hamilton, in *Federalist No. 33*, discussed the necessity of the inclusion of the Supremacy Clause:

> Hence we perceive that the clause which declares the supremacy of the laws of the Union . . . only declares a truth which flows immediately and necessarily from the institution of a federal government.

Since that time, however, this area of the law has required extensive effort by the federal judiciary to achieve the proper relationship between federal and state statutes which regulate the same areas of conduct. Legislation by the federal and state governments in the same area does not necessarily mean that the state law must give way under the Supremacy Clause:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Florida Lime & Avocado Growers, Inc. vs. Paul*, 373 U.S. 132, 142-143, 10 L.Ed. 2d 248, 83 S.Ct. 1210 (1963), or where the state "law stands as an absolute obstacle to the accomplishment and execution of the full purposes and objections of Congress." *Hines vs. Davidowitz*, 312 U.S. 52, 67, 85 L.Ed. 2d 581, 61 U.S. 399 (1941); *Jones vs. Rath Packing Co.*, 430 U.S. 519, 526, 540-541, 51 L.Ed. 2d 604, 97 S.Ct. 1305 (1977), Accord *Decanas vs. Bica*, 424, U.S. 351, 363 47 L.Ed. 2d 43, 96 S.Ct. 933 (1976). *Ray vs. Atlantic Richfield Co.*, 435 U.S. 151, 158, 55 L.Ed. 2d 179, 98 S.Ct. 988 (1978).

Obviously the Supremacy Clause does not prohibit state regulation in areas dealt with by federal legislation and regulation. *Hancock vs. Train*, 426 U.S. 167, 179-180, 48 L.Ed. 2d 555, 96 S.Ct. 2006 (1976). Because the nullification of state laws under the Supremacy Clause of the United States Constitution is an extreme action by the Court, conflict between federal and state laws should not be sought where none exists. *Exxon Corp. vs. Governor of Maryland*, 437 U.S. 117, 130, 57 L.Ed. 2d 91, 98 S.Ct. 2207, (1978). See also *Seagram & Sons, Inc. vs. Hostetter*, 384 U.S. 35, 16 L.Ed. 2d 336, 86 S.Ct. 1254 (1966). The "absolute obstacle" and "physical impossibility" tests set forth above have not been met.

There is no doubt that the federal statutes are paramount in the area of payments in lieu of taxes under the program established by P.L. 94-565: The land is federal land and the payments are federal funds. However, state legislation in the area is possible when such laws are not in conflict or do not burden the federal enactments. A common sense reading of

the federal and state statutes in question gives meaning to both statutes without destroying the original purpose of the federal law. In fact, the state law simply implements the federal purpose. As the United States Supreme Court held in one of the landmark decisions in the Supremacy Clause area:

> The test of whether both federal and state regulations may operate or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives. *Florida Lime & Avocado Growers, Inc. vs. Paul*, 373 U.S. 132, 142, 10 L.Ed. 2d 248, 83 S.Ct. 1210 (1963) **reh. denied**, 374 U.S. 858, 10 L.Ed. 2d 1082, 83 S.Ct. 1861 (1964).

Several factors support the School District's contention that its common sense approach to this problem should be adopted by this Court in determining the issue presented in this action.

Soon after the passage of SDCL 5-11-6 several questions were asked of the Attorney General of South Dakota concerning the applicability of SDCL 5-11-6 to P.L. 94-565 funds received by the counties. In answer to the question of the applicability of SDCL 5-11-6 when P.L. 94-565 specifically directs the payments to a general purpose unit of government, the Attorney General of South Dakota stated, in part, that

> These statutory provisions, however, do not make it unlawful or inappropriate for the state legislature to require that such funds to be utilized in a manner similar to any other tax monies raised by the county. Absent federal restrictions on the use of these funds for school purposes, these funds can be used for legitimate governmental purposes such as schools. *Kendall vs. Towns County*, 247 S.E. 2d 577 (1978). AGR 80-12, P.3.

The issue presented in this action also requires a discussion of the relationship between the State of South Dakota and the several counties of the state. Article IX, Section 1 of the South Dakota Constitution states, in part, that "the Legislature shall have plenary powers to organize and classify units of local government..." In Title 7 of the South Dakota Codified Laws, the State Legislature has not only set the county boundaries and established county officers and their duties, but has also set forth a wide range of laws governing general county government. In addition to this development of county government, the State Legislature has also, in Chapter 10-12 of the South Dakota Codified Laws, established statutory guides for state and local (meaning counties and municipalities) property tax levies. Having followed these state statutory guidelines in setting tax rates and determining the distribution scheme of their normal tax revenues, it is incongruous for Lawrence County to now say that federal funds they receive *in lieu of these same taxes* are not required to be distributed, in accordance with state law in the same manner as other tax revenues are distributed. As political subdivisions of the state, the counties are clearly susceptible to state guidance in the management of their fiscal affairs. SDCL 5-11-6 is state guidance to the counties for payments they receive in lieu of taxes. Combining this state-county relationship, then, with the compatible reading of SDCL 5-11-6 and P.L. 94-565 helps to show the fallacy of Lawrence County's claim.

To stretch the meaning of the phrase "for any governmental purpose," as Lawrence County suggests, is incorrect. The design behind the inclusion of the phrase "for any governmental purpose" in P.L. 94-565 is to eliminate the restrictions on the money's use. Under many federal funding programs, the money funneled to the state or county can be used only for roads, schools or other specified uses. The questioned phrase in P.L. 94-565 simply eliminates these restrictions.

The School District seriously questions the applicability of either *Kendall vs. Towns County*, 247 S.E. 2d 577 (GA 1978) or *Meade Township vs. Andrus*, Civ. No. G77-496 CA7 (W.D. Mich. October 31, 1979). Both of these decisions have been previously cited by Lawrence County to support their claims concerning P.L. 94-565. Neither provides such support. In *Kendall*, the Court stated:

> Since under the law as written, it is provided that the funds may be used for any governmental purpose, the Secretary recognized the "limitations cannot be placed upon the use of these funds by regulations." Thus, in dispensing the funds there are no provisions in the regulations stating how the funds are to be used." *Kendall, supra* at 579.

This excerpt actually supports the School District's basic contention. According to *Kendall*, the Secretary of the Interior cannot, by regulation, require that the P.L. 94-565 funds be used to support only schools, only roads, or only rural sewage systems. This reading is argument that P.L. 94-565 funds are to be used to provide support, in the same manner as regular tax revenues provide support, of all the governmental services supplied by the county.

Meade Township, supra, discusses the question of the proper unit of local government to receive, directly from the federal government, the P.L. 94-565 monies. Because of the importance of townships in Michigan, the federal trial court ordered the Secretary of the Interior to restudy the validity of his determination that the county is the proper unit of local government in Michigan. *Meade Township, supra* at 12-14. The question presented in the present action is not addressed in *Meade Township*. The School District does not question the propriety of the county as the unit of government in South Dakota which should initially receive the P.L. 94-565 funds.

The only real support found in *Meade Township* is s[illegible] port for the School District's position. As the Court correctly points out:

> The intended effect of the payments to local units of government is to relieve the fiscal burden of these tax exempt entitlement lands within their boundaries. *Meade Township, supra* at 2.

2. Public Policy

When the Constitution of the State of South Dakota was adopted by the people of South Dakota it clearly stated and continues to state that the Legislature is authorized to create other political subdivisions to administer the governmental requirements of the people. The State of South Dakota did not create separate sovereign governments. Lawrence County is not a sovereignty unto itself. It is subject to legislative enactment. Lawrence County is not immune to legislative enactment.

Congress passed Public Law 94-565. Under that law, Lawrence County is to receive monies "in lieu of taxes" that would have been paid if the property owned by the United States of America was owned by private individuals. Lawrence County is the appropriate governmental entity that is to receive the monies under Public Law 94-565. The Lead-Deadwood Independent School District does not challenge that Lawrence County is the appropriate recipient of these funds.

Every year during budget time the school districts within Lawrence County go to the county commissioners and submit their budgets to them. The county commissioners then determine in their sole and exclusive discretion how the tax revenues and other revenues of Lawrence County will be

divided so that the school districts can function as separate governmental entities within the county. One must presume that the County Commissioners of Lawrence County distribute monies in a fair, equitable and just manner.

The South Dakota Legislature as the controlling legislative body over all county governments, enacted SDCL 5-11-6 in 1979. The statute merely states that the county auditor is to distribute the federal payments which are in lieu of taxes in the same manner as taxes are distributed. The county commissioners meet, discuss and decide how to distribute tax dollars in Lawrence County. The statute does not say the county commissioners must distribute Public Law 94-565 monies to the school district. The Lead-Deadwood School District does not wish Lawrence County to distribute all Public Law 94-565 monies to it. The statute states the school district is entitled to their proportionate share of Public Law 94-565 monies. Nothing more, nothing less. 31 USC Section 1601, P.L. 94-565 Section 1, says that "such payment may be used by such unit of government for any governmental purpose." That is exactly what the Lead-Deadwood School District wishes to occur.

There is no conflict in the statute that directs the county to distribute Public Law 94-565 monies in the same way that they have decided to distribute tax monies. The Federal statute says that the county is to distribute this money for any governmental purpose. The county commissioners determine how all revenues will be used. The state law requires that in lieu of funds are to be distributed as other taxes. Distributing money to school districts is certainly a governmental purpose.

The County Commissioners of Lawrence County make no bones on how they feel. They have told the school district if they want any of this money they have to come and ask for it.

Then the county will decide whether or not to dole it out to them. This is pure unadulterated politics. The county commissioners don't want to distribute the money to the school district because they do not want to raise their taxes to make up the difference. The commissioners want to pass the "tax" political football to the school district. They want to advise the tax payers of this county that they, the county commissioners, are not raising taxes, the school districts are.

The Lawrence County Commissioners duck behind the Supremacy Clause for protection. Judge Moses agreed with them. Judge Moses stated in his Memorandum Opinion the school district wants all the monies under Public Law 94-565. That is not true. That is not at all what the Lead-Deadwood School District wants. They want the county to distribute the in lieu of tax money from the federal government in the same just, equitable and reasonable way the county commissioners have decided to distribute other tax dollars. It seems ludicrous that a school district must sue the county commissioners and force them to distribute money in a way the county commissioners have already determined to be fair, just, equitable and reasonable.

Other than the proposition that this stance is pure politics on the part of the commissioners, the Lead-Deadwood School District cannot understand why the county commissioners have adopted the attitude on Public Law 94-565 monies they have. Why isn't the school district entitled to its fair, just, reasonable and equitable share of these in lieu of tax monies? What is so onerous about SDCL 5-11-6 that the Lawrence County Commissioners cannot abide by it? Isn't supporting school districts a governmental purpose? Isn't the education of the youth of South Dakota the prime responsibility of local governmental entities?

CONCLUSION

The federal program making payments to counties in lieu of taxes for federal lands within the counties and the state statute which provides for the distribution of these federal payments in the same manner as taxes are distributed are totally compatible. When read with a common sense approach, the two acts are not only compatible, but also practical. The federal statute defines the point of distribution of the funds; the state statute delineates the plan for distribution of the funds.

Respectfully submitted,

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Dated: November 8, 1983

Office - Supreme Court, U.S.
FILED
FEB 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-240

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY, ET AL., APPELLANTS

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether South Dakota Codified Laws § 5-11-6 (rev. 1980) is inconsistent with the Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, and therefore invalid under the Supremacy Clause to the extent it requires that funds received by local government units under the federal statute be apportioned in the same manner as taxes are distributed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-240

LAWRENCE COUNTY, ET AL., APPELLANTS

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*,[1] requires the Secretary of the Interior to make annual payments to local governments within whose boundaries the United States owns tax-exempt federal "entitlement

[1]Title 31 of the United States Code was recodified in 1982 by Pub. L. No. 97-258, 96 Stat. 877 *et seq.* The recodification did not make any substantive change in the law. See H.R. Rep. 97-651, 97th Cong., 2d Sess. 3 (1982). In future editions of the Code, the Payments in Lieu of Taxes Act will appear at 31 U.S.C. 6901 *et seq.*, instead of 31 U.S.C. 1601 *et seq.* In this brief, we refer to the recodified version.

lands."[2] The purpose of the Act is to compensate local governments for the loss of tax revenues resulting from the tax immunity of such federal lands. See pages 3-4, 9-10, *infra*. The lands to which the Act applies include wilderness areas and other lands within the National Park System and National Forest System, lands administered by the Bureau of Land Management, lands used by the Army Corps of Engineers for water resource development projects and dredge disposal areas, and lands on which semi-active and inactive military installations are located. See 31 U.S.C. 6901. Those lands total over 450 million acres. Payments under the Act amount to almost $100 million annually and are made to approximately 1,700 counties, located in 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. See U.S. Dep't of the Interior, Bureau of Land Management, *Payments in Lieu of Taxes, Fiscal Year 1983*, at 1.

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[2]31 U.S.C. 6902(a) provides:

> The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose.

31 U.S.C. 6901 provides in pertinent part:

* * * * *

> (2) "unit of general local government" means —
>
> (A) a county, city, township, borough existing in Alaska on October 20, 1976, or other political subdivision of a State that the Secretary of the Interior, on the same basis that the Secretary of Commerce uses for general statistical purposes, decides is a general purpose political subdivision of a State;

* * * * *

The Payments in Lieu of Taxes Act was the product of long and careful consideration at the federal level.[3] Over the years Congress has enacted a number of different impact aid programs designed to compensate states and localities for loss of tax revenues resulting from the tax immunity of federal lands.[4] But the revenues that fund those impact aid programs generally are derived from income-producing activities on federal lands, such as oil and gas leasing, mining, and grazing, and the payments are therefore likely to vary from year to year. Moreover, in a number of instances, funds paid under the impact aid programs are earmarked by statute for particular purposes, such as the building of public roads or the support of public schools. See S. Rep. 94-1262, 94th Cong., 2d Sess. 7 (1976). These circumstances, among many others, led to the establishment, in 1964, of the Public Land Law Review Commission, to which Congress assigned the task of reviewing the full range of laws applicable to federal lands and recommending any needed revisions.[5]

In its 1970 final report, the Commission concluded that "it is the obligation of the United States to make certain that the burden of [the policy of retaining lands under federal

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[3]The problem of the effect on state and local governments of the tax immunity of federal lands within their boundaries has existed for many years. In 1806, the Attorney General issued the first legal opinion regarding nontaxability of federal lands by state governments. 1 Op. Att'y Gen. 157 (quoted in *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 163 (1886)). This Court's opinions in *Van Brocklin* and in *Wisconsin Central R.R.* v. *Price County*, 133 U.S. 496 (1890), established the "inflexible rule, with no exceptions, that property of the Federal Government may not, absent the express consent of the Government, be taxed by a State or subdivision thereof." *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Pt. II*, 267 (1957).

[4]31 U.S.C. 6903(a)(1) contains a partial listing of these programs.

[5]Pub. L. No. 88-606, 78 Stat. 982.

ownership] is spread among all the people of the United States and is not borne only by those states and governments in whose area the lands are located. Therefore, the Federal Government should make payments to compensate state and local governments for the tax immunity of Federal lands." *One Third of the Nation's Land: A Report to the President and to the Congress* 236 (1970). The Commission recommended replacement of the numerous revenue-sharing statutes then on the books with a single payment in lieu of taxes. However, Congress concluded that it was not feasible at that time to repeal the existing statutes. S. Rep. 94-1262, *supra*, at 1 *i*. Instead, in 1976 Congress passed the Payments in Lieu of Taxes Act, which provides for a minimum level of payments to local government units to compensate partially for lost revenues not covered by payments received under other statutes.

2. In 1979, the State of South Dakota enacted a statute requiring local governments to distribute federal payments in lieu of taxes in the same way as general tax revenues are distributed. S. D. Codified Laws § 5-11-6 (rev. 1980) provides:

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

Since appellant Lawrence County allocates to its school districts approximately 60% of general tax revenues, the South Dakota statute effectively requires it also to apportion to the school districts 60% of the federal in lieu of taxes payments it receives.

3. Lawrence County originally brought an action in the United States District Court for the District of South Dakota seeking a declaration that the state statute is in conflict with the Payments in Lieu of Taxes Act and is

therefore void under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2). The district court held that the federal statute vests total discretion in the counties with respect to distribution of federal in lieu of taxes payments and that the states may not dictate the manner of distribution. The court therefore declared the South Dakota statute void insofar as it affected distribution of funds received under the Payments in Lieu of Taxes Act and granted summary judgment for Lawrence County. *Lawrence County* v. *South Dakota*, 513 F. Supp. 1040 (D.S.D. 1981). The United States Court of Appeals for the Eighth Circuit vacated the district court judgment on the ground that the County's invocation of the Supremacy Clause did not convert the action into one arising under federal law for the purpose of federal jurisdiction under 28 U.S.C. 1331. *Lawrence County* v. *South Dakota*, 668 F.2d 27 (8th Cir. 1982).

4. Lead-Deadwood School District No. 40-1, appellee in this Court, then filed a complaint for writ of mandamus in the Circuit Court for the Eighth Judicial Circuit of South Dakota, seeking to compel Lawrence County to distribute federal in lieu of taxes funds according to S.D. Codified Laws § 5-11-6. The trial court declined to issue the writ, citing the Payments in Lieu of Taxes Act (J.S. App. 8a-10a). The court held that the South Dakota statute stood as an "obstacle to the accomplishment and the execution of the full purposes and objectives of Congress and as such is unconstitutional and void under the supremacy clause of the federal and state constitutions" (J.S. App. 10a).

The Supreme Court of South Dakota reversed (J.S. App. 1a-7a). Because the State Supreme Court found the language of the federal statute to be "plain, clear and rational" (*id.* at 3a), it concluded that review of the legislative history was unnecessary. The court found no conflict between the state and federal statutes, reasoning that the federal statute

required only that payments be used for a governmental purpose and that support of schools is a valid governmental purpose (*id.* at 4a). Two justices dissented on the ground that the statute as a whole, along with its legislative history, indicated that "Congress intended [that] the county be vested with total discretion in distributing [federal in lieu of taxes] funds" (*id.* at 6a).

DISCUSSION

This Court has frequently reiterated that a state statute is void if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, No. 81-1945 (Apr. 20, 1983), slip op. 11; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, to determine whether state and federal laws are in conflict it is necessary first to "ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9. See also *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

Here the federal statute, the Payments in Lieu of Taxes Act, is properly read as conferring discretion on local governments to allocate the payments they receive under the Act. S.D. Codified Laws § 5-11-6, which requires local governments to apportion those payments in a particular manner, therefore conflicts directly with the mandate of the federal statute and interferes with the accomplishment of Congress's goals. The state statute is invalid under the

Supremacy Clause to the extent it mandates allocation of the federal payments.

If permitted to stand, the decision of the South Dakota Supreme Court will frustrate one of the congressional objectives underlying the Payments in Lieu of Taxes Act. In addition, the decision may encourage other states to follow South Dakota's example, leading to further interference with operation of the federal program. Therefore, we join appellants in urging the Court to note probable jurisdiction and to reverse the judgment of the South Dakota Supreme Court.[6]

1. a. The natural reading of the Payments in Lieu of Taxes Act is that local governments receiving funds under the Act have complete discretion in expending or allocating those funds. 31 U.S.C. 6902(a) expressly states that units of local government "may use" payments under the Act "for any governmental purpose." The import of this broad language is that recipients of federal payments may choose

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[6]In the earlier litigation in which Lawrence County challenged the South Dakota statute, the Eighth Circuit concluded that the County had failed to present a question arising under federal law for purposes of federal court jurisdiction under 28 U.S.C. 1331. See 668 F.2d at 30-32. That disposition was, of course, without prejudice to the substantiality of the federal claim; the sole basis of the ruling was a finding that the federal issue arose only as a defense to a state law claim for funds that had not yet been made. Cf. *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 248-249 (1952).

In the proceedings now before the Court, the appellants raised their claim of unconstitutionality under the Supremacy Clause as a defense to a state court mandamus action in which appellee sought to require the County to pay to it a given percentage of the federal in lieu of taxes payments. The South Dakota Supreme Court upheld the South Dakota statute in the face of appellants' claim that it is invalid because repugnant to a federal statute, thus bringing the case within the Court's appellate jurisdiction under 28 U.S.C. 1257(2).

how to apply them, as long as the funds are used for a governmental purpose.[7]

The federal statute also makes it clear that payments are to be made directly to general government units, not to special purpose units such as school districts; indeed, appellee admits as much (Mot. to Aff. 2). Under 31 U.S.C. 6901(2), a "unit of general local government" is defined as a "general purpose political subdivision of a State." Thus, it is general purpose units, such as appellant Lawrence County, that are entitled to receive the federal funds and to decide how they will be spent. While a county may choose to allocate some of the funds to school districts, it need not do so. In explaining the Payments in Lieu of Taxes Act, the court in *Altus-Denning School District No. 31* v. *Franklin County,* 568 F.Supp. 95, 101 (W.D. Ark. 1983), correctly noted (emphasis in original):

> [E]ven though Congress no doubt intended for some of the in lieu of tax funds to go to school districts, believing that the counties would disburse these funds with prudence, equity, and an eye to the obvious needs of the school districts, Congress nonetheless expressly allowed

[7]The South Dakota Supreme Court concluded that the language of the federal statute signifies only a requirement that funds be used for some governmental purpose and includes no restriction on payment of funds to school districts. The court therefore construed the federal statute as not precluding a state requirement that local governments pay the federal funds to school districts. But this construction of the statute fails to give meaning to the words "may use" in 31 U.S.C. 6902(a) ("may be used" under 31 U.S.C. 1601), which appear to indicate that the local governments will have discretion to choose the governmental purposes for which they will use the funds.

The word "may" could be read as merely permitting or authorizing use by a local government of federal funds for any governmental purpose, not as precluding imposition of restrictions on such use. See H.R. Rep. 97-651, *supra,* at 2. But the legislative history, discussed below, indicates that Congress had a broader meaning in mind.

> whichever unit constitutes the "unit of local government" of [31 U.S.C. 6901] to expend these funds for *any* governmental purpose.

See also *Kendall* v. *Towns County,* 146 Ga. App. 760, 762, 247 S.E.2d 577, 579 (1978).[8]

b. The legislative history of the Payments in Lieu of Taxes Act confirms our reading of the statute. The South Dakota Supreme Court found it unnecessary to examine that legislative history because it viewed the language of the statute as "plain, clear and rational" (J.S. App. 3a). As we have shown, the court below appears to have misread the statutory language. But in any event, the court clearly erred in disregarding the legislative history and underlying purpose of the statute. See *Dickerson* v. *New Banner Institute, Inc.,* No. 81-1180 (Feb. 23, 1983), slip op. 15-16; *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9-11 (1976).

The legislative history reveals that Congress intended not only that local governments receive increased levels of funding under the Payments in Lieu of Taxes Act, but also that they have discretion in allocating those funds. Both congressional committees that considered the legislation stated

[8]Consideration of another provision of the federal statute, 31 U.S.C. 6904(b), provides additional support for this interpretation. Section 6904(b) provides expressly that in the case of certain additional short-term federal payments in connection with acquisition of park or wilderness areas, the Secretary "shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest." Thus, Congress knew how to express an intention that funds be earmarked for school districts. The express directive in Section 6904(b) reinforces the conclusion that Congress did not wish funds authorized under 31 U.S.C. 6902(a) to be earmarked for school districts, but rather intended for local governments themselves to have the discretion to allocate such funds. See *Fedorenko* v. *United States,* 449 U.S. 490, 512 (1981).

unequivocally that "payments under [the Payments in Lieu of Taxes Act] should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose." S. Rep. 94-1262, *supra*, at 15; H.R. Rep. 94-1106, 94th Cong., 2d Sess. 12 (1976). See also 122 Cong. Rec. 25742 (1976) (remarks of Rep. Quillen) ("the local governments are given the discretion to use these moneys as they determine").

In providing that local governments were to be the recipients of the payments under the new statute, Congress expressly rejected as unsatisfactory the scheme of many of the existing impact aid programs under which states (rather than local governments) received funds and decided how they would be distributed. S. Rep. 94-1262, *supra*, at 15. The Senate committee noted that it is local governments that bear the burden of providing a wide variety of services related to the presence of land within their boundaries (*id.* at 8-9):

> These lands attract thousands of visitors each year, yet the intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands.

Congress also expressed dissatisfaction with the earmarking of funds that had resulted either from federal statutory requirements or the fact that states controlled the distribution of funds under some programs. The Senate

committee noted that use of funds under existing programs was often restricted to construction and maintenance of roads and schools (S. Rep. 94-1262, *supra*, at 9), but that the range of local government needs was in fact much greater:

> [L]ocal governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

Ibid. Thus, it was an important purpose of the new statute to give local governments control over federal funds and the freedom to allocate them in a manner that would allow satisfaction of the wide range of needs for governmental services that arise from the presence of federal lands.[9]

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[9]A subsequent amendment to the Payments in Lieu of Taxes Act sheds further light on Congress's intent in enacting the original statute. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). In 1983, Congress amended the Act to authorize states to make limited redistributions of payments among units of general purpose local government within the same county. Pub. L. No. 98-63, § 3(4), 97 Stat. 324 (to be codified at 31 U.S.C. 6907). See J.S. App. 36a. The 1983 amendment was passed in response to *Meade Township* v. *Andrus*, 695 F.2d 1006 (1982), in which the Sixth Circuit held that the Secretary of the Interior had exceeded his authority under the Payments in Lieu of Taxes Act in refusing to provide for payments to townships as well as counties in Michigan. See 129 Cong. Rec. S 8444 (daily ed. June 15, 1983). The fact that Congress found it necessary to provide expressly that a state may reallocate funds in a certain manner lends additional weight to the conclusion that, in the absence of such a provision, states may not dictate the distribution of in lieu of taxes payments.

c. The Department of the Interior — the agency charged with administration of the Payments in Lieu of Taxes Act — has consistently interpreted that statute as requiring that federal payments be made to general purpose local government units and that those units retain the discretion to use the funds for any governmental purpose. The Department promulgated 43 C.F.R. Subpart 1881 in 1977, soon after passage of the Act. 43 C.F.R. 1881.0-5(b)(2) makes clear that school districts may not receive funds directly.[10] 43 C.F.R. 1881.2 states that payments made to local governments (with the exception of the additional payments authorized by 31 U.S.C. 6904(b)) may be used for "any governmental purpose." The Department's interpretation of the Act as foreclosing either direct payments to school districts or limitations on use of the funds is entitled to deference. See, *e.g., Blum* v. *Bacon,* 457 U.S. 132, 141 (1982); *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31-32 (1981); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450-451 (1978); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).[11]

d. It is no answer that, in this instance, the State law —with superficial appropriateness — merely directs the recipient counties to allocate the federal monies "in the same manner as taxes are distributed," rather than according to a formula directly prescribed by the State. South Dakota law appears to require counties to set a levy on taxable property at a rate sufficient to meet the school

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[10]43 C.F.R. 1881.0-5(b)(2) provides:

> The term "unit of general government" excludes single purpose or special purpose units of local government such as school districts or water districts.

[11]Two courts have found the Secretary's regulations to be consistent with the federal statute in this respect. See *Altus-Denning School District No. 31* v. *Franklin County,* 568 F. Supp. at 101; *Kendall* v. *Towns County,* 146 Ga. App. at 762, 247 S.E.2d at 579.

budget. S.D. Codified Laws §§ 10-12-29, 13-11-3 (rev. 1982). Thus, a county apparently may not reduce a school district's share of taxes in anticipation that federal in lieu of taxes payments would meet any shortfall. Even if counties were free to expend or allocate locally raised taxes as they wished, it is doubtful that they would be able to adjust their tax distribution plans in such a way as to prevent any increment to school districts by virtue of the federal payments. County revenues, including other federal impact program funds, some of them specially earmarked, vary from year to year. Moreover, the State presumably retains power to control local budgets and might well intervene if a county were seen to be evading the intent of the State directive.

At all events, the counties receiving in lieu of taxes payments from the United States ought not be pushed into complex schemes to circumvent State intrusion. The purpose of these federal payments is to give local governments a minimum amount of federal money to use at their discretion to fill in gaps, to reduce fiscal and budgetary swings, and to allow more effective planning. This can be accomplished only through local control and decisionmaking.

It is thus clear that S.D. Codified Laws § 5-11-6 (rev. 1980) conflicts directly with the Payments in Lieu of Taxes Act. The South Dakota statute requires localities to expend the federal in lieu of taxes payments in a particular manner; that is inconsistent with the language and legislative purpose of the federal statute, under which local governments are to have discretion in apportioning the payments. The federal statute, read in the light of the underlying congressional purpose, leaves no room for such state interference with local discretion. Cf. *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. at 318; *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 583-585 (1979). Therefore, to

the extent the South Dakota statute purports to affect the distribution of federal in lieu of taxes payments, it is invalid under the Supremacy Clause.[12]

2. This case is of considerable practical importance. If the decision of the South Dakota Supreme Court is allowed to stand, South Dakota counties will be required to allocate federal in lieu of taxes payments in a manner they probably would not otherwise choose. As a result, certain local programs will not receive the full amount of financial support the local government regards as proper. As a result, the scope of such programs will be curtailed, perhaps reducing the level of essential services the local governments are able to offer in connection with federal lands.

Moreover, if not reversed by this Court, the decision below may encourage other states to enact legislation similar to the South Dakota statute — or even more intrusive. In the past other states have enacted statutes that interfere with (or have the potential to interfere with) the distribution of federal payments under various in lieu of taxes programs. See *Altus-Denning School District No. 31* v. *Franklin County, supra; Hergenreter* v. *Hayden,* 295 F. Supp. 251 (D. Kan. 1968); *Shepheard* v. *Godwin,* 280 F. Supp. 869

[12]This conclusion is consistent with *Altus-Denning School District No. 31* v. *Franklin County, supra,* in which the district court rejected the contention that Ark. Stat. Ann. § 80-726 (repl. 1980) required that counties share federal in lieu of taxes payments with school districts. The Arkansas statute required county treasurers to apportion to school districts any funds received from income from national forests. The district court concluded that, assuming arguendo that the Arkansas statute applied to funds under the Payments in Lieu of Taxes Act, the state statute would be invalid under the Supremacy Clause because it would conflict with the "any governmental purpose" language in the federal statute. 568 F. Supp. at 102.

(E.D. Va. 1968).[13] Thus far, such statutes have been held invalid or inapplicable to federal in lieu of taxes payments. However, if the South Dakota statute survives judicial review, other states (many of which are facing budgetary difficulties) can be expected to use it as a model in their efforts to gain greater control of available revenues. The result will be to undermine further the congressional purpose underlying the Payments in Lieu of Taxes Act.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal.

Respectfully submitted.

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FEBRUARY 1984

[13]The Kansas and Virginia statutes at issue in the *Hergenreter* and *Shepheard* cases required deduction from a school district's share of state educational funding of certain federal payments made to school districts impacted by federal land and federal employees. In both cases, three-judge courts held the statutes invalid on the ground that they conflicted with the purpose of the federal program, which was to supplement local revenues, not to replace them.

Office - Supreme Court, U.S
FILED
JUN 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-240

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY, ET AL., APPELLANTS

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether South Dakota Codified Laws Ann. § 5-11-6 (rev. 1980) is inconsistent with the Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, and therefore invalid under the Supremacy Clause to the extent it requires that funds received by local government units under the federal statute be apportioned in the same manner as taxes are distributed.

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LAWRENCE COUNTY, ET AL., APPELLANTS

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LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

The question presented by this case is whether a state statute that directs local government recipients of federal in lieu of taxes payments to distribute those funds in the same manner as general tax revenues are distributed conflicts with the scheme established by the Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.* In response to the Court's invitation, we filed a brief at the jurisdictional stage urging the Court to note probable jurisdiction and to reverse the decision of the South Dakota Supreme Court upholding the state statute against a challenge under the Supremacy Clause. The Court having determined to give the case plenary consideration, we deem it appropriate now to submit a brief on the merits.

The United States has a substantial interest in the outcome of this case. The Department of the Interior is responsible for the administration of the Payments in Lieu of Taxes Act. In our view, the state statute at issue conflicts with the language and legislative purpose of the federal statute, under which localities, not states, are to have discretion with respect to use of the federal money. Under the decision of the court below, localities will be deprived of this discretion, with the result that local services of importance to activities on federal lands may be underfunded. Moreover, other states may look to the decision below as justification for enacting similar statutes, thus undermining further the congressional purpose.

STATEMENT

1. The Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*,[1] requires the Secretary of the Interior to make annual payments to local governments within whose boundaries the United States owns tax-exempt federal "entitlement lands."[2] Eligible units of local government include counties, towns and other general purpose political subdivisions of a state, but not

[1] Title 31 of the United States Code was recodified in 1982 by Pub. L. No. 97-258, 96 Stat. 877 *et seq.* The recodification did not make any substantive change in the law. See H.R. Rep. 97-651, 97th Cong., 2d Sess. 3 (1982). The Payments in Lieu of Taxes Act now appears at 31 U.S.C. 6901 *et seq.*, instead of 31 U.S.C. (1976 ed.) 1601 *et seq.*

[2] 31 U.S.C. 6902(a) provides:

> The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose.

special purpose public bodies, such as school boards.[3] The purpose of this Act is to compensate local governments in part for the loss of tax revenues resulting from the tax immunity of such federal lands. See pages 4-5, 13-17, *infra*. The lands to which the Act applies include wilderness areas and other lands within the National Park System and National Forest System, lands administered by the Bureau of Land Management, lands used by the Army Corps of Engineers for water resource development projects and dredge disposal areas, and lands on which semi-active and inactive military installations are located. See 31 U.S.C. 6901(1). These lands total over 450 million acres. Payments under the Act amount to almost $100 million annually and are made to approximately 1,700 counties, located in 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. See Division of Finance, Bureau of Land

[3] 31 U.S.C. 6901 (as amended by Pub. L. No. 98-63, § 3(1), 97 Stat. 323) provides in pertinent part:

> (2) "unit of general local government" means
>
> (A) a county (or parish), township, borough existing in Alaska on October 20, 1976, or city where the city is independent of any other unit of general local government, that: (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term "governmental services" includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation and governmental administration * * *.

Management, U.S. Dep't of the Interior, *Payments in Lieu of Taxes, Fiscal Year 1983*, at 1.

The Payments in Lieu of Taxes Act was the product of many years of consideration at the federal level.[4] Over the years Congress has enacted a number of different impact aid programs designed to compensate states and localities for loss of tax revenues resulting from the tax immunity of federal lands.[5] But the revenues that fund those impact aid programs generally are derived from income-producing activities on federal lands, such as oil and gas leasing, mining, and grazing, and the payments are therefore likely to vary from year to year. Moreover, in a number of instances, funds paid under the impact aid programs are earmarked by statute for particular purposes, such as the building of public roads or the support of public schools. See S. Rep. 94-1262, 94th Cong., 2d Sess. 7 (1976). In 1964, Congress established the Public Land Law Review Commission and

[4] The problem of the effect on state and local governments of the tax immunity of federal lands within their boundaries has existed for many years. In 1806, the Attorney General issued the first legal opinion regarding nontaxability of federal lands by state governments. 1 Op. Att'y Gen. 157 (quoted in *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 163 (1886)). This Court's opinions in *Van Brocklin* and in *Wisconsin Central R.R.* v. *Price County*, 133 U.S. 496 (1890), established the "inflexible rule, with no exceptions, that property of the Federal Government may not, absent the express consent of the Government, be taxed by a State or subdivision thereof." *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Pt. II, at 267 (1957).

[5] 31 U.S.C. 6903(a)(1) contains a partial listing of these impact aid programs.

assigned it the task of reviewing the full range of laws applicable to federal lands and recommending any needed revisions.[6] The Commission's review included consideration of the shortcomings of the various programs under which states and localities received federal payments on account of the tax immunity of federal lands within their boundaries.

In its 1970 final report, the Commission concluded that "it is the obligation of the United States to make certain that the burden of [the policy of retaining lands under federal ownership] is spread among all the people of the United States and is not borne only by those states and governments in whose area the lands are located. Therefore, the Federal Government should make payments to compensate state and local governments for the tax immunity of Federal lands." Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* 236 (1970). The Commission recommended replacement of the numerous revenue-sharing statutes then on the books with a single payment in lieu of taxes. However, Congress concluded that it was not feasible at that time to repeal the existing impact aid programs. S. Rep. 94-1262, *supra*, at 11. Instead, in 1976, Congress passed the Payments in Lieu of Taxes Act, which provides for a minimum level of payments to local government units to compensate partially for lost revenues not covered by payments received under other federal statutes.

2. In 1979, the State of South Dakota enacted a statute requiring local governments to distribute federal and state payments in lieu of taxes in the same way as general tax revenues are distributed. S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) provides:

[6] Pub. L. No. 88-606, 78 Stat. 982 *et seq.*

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

Since appellant Lawrence County allocates to its school districts approximately 60% of general tax revenues, the South Dakota statute effectively requires it also to apportion to the school districts 60% of the federal in lieu of taxes payments it receives.

3. Lawrence County originally brought an action in the United States District Court for the District of South Dakota seeking a declaration that the state statute is in conflict with the Payments in Lieu of Taxes Act and is therefore void under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2). The district court held that the federal statute vests total discretion in the counties with respect to distribution of federal in lieu of taxes payments and that the states may not dictate the manner of distribution. The court therefore declared the South Dakota statute void insofar as it affects distribution of funds received under the Payments in Lieu of Taxes Act and granted summary judgment for Lawrence County. *Lawrence County* v. *South Dakota*, 513 F. Supp. 1040 (D.S.D. 1981). However, the United States Court of Appeals for the Eighth Circuit vacated the district court judgment on the ground that the County's invocation of the Supremacy Clause did not convert the action into one arising under federal law for the purpose of federal jurisdiction under 28 U.S.C. 1331. *Lawrence County* v. *South Dakota*, 668 F.2d 27 (1982).

4. Lead-Deadwood School District No. 40-1, appellee in this Court, then filed a complaint for writ of mandamus in the Circuit Court for the Eighth Judicial Circuit of South Dakota, seeking to compel Lawrence County to distribute federal in lieu of taxes funds according to S.D. Codified Laws Ann. § 5-11-6 (rev. 1980). The trial court declined to issue the writ, citing the Payments in Lieu of Taxes Act (J.S. App. 8a-10a). The court held that the South Dakota statute stood as an "obstacle to the accomplishment and the execution of the full purposes and objectives of Congress and as such is unconstitutional and void under the supremacy clause of the federal and state constitutions" (J.S. App. 10a).

The Supreme Court of South Dakota reversed (J.S. App. 1a-7a). Because the State Supreme Court found the language of the federal statute to be "plain, clear and rational" (*id.* at 3a), it concluded that review of the legislative history was unnecessary. The court found no conflict between the state and federal statutes, reasoning that the federal statute required only that payments be used for a governmental purpose and that support of schools is a valid governmental purpose (*id.* at 4a). Two justices dissented on the ground that the federal statute as a whole, along with its legislative history, indicated that "Congress intended [that] the county be vested with total discretion in distributing [federal in lieu of taxes] funds" (*id.* at 6a).

SUMMARY OF ARGUMENT

Under the federal Payments in Lieu of Taxes Act Congress conferred discretion on local governments to decide how they wish to spend the federal funds they receive under the Act. Because S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) limits the manner in which local governments may apportion those federal funds, it conflicts with the congressional purpose and is therefore invalid under the Supremacy Clause.

A. The language of the Payments in Lieu of Taxes Act indicates that the local government recipients of funds under the Act are to have complete discretion in determining how to allocate those funds. Under the Act, recipients (which must be general government units, rather than special purpose units such as school districts) "may use" payments under the Act "for any governmental purpose."

B. Even if the language of the statute were not decisive on this point, the legislative history makes clear that Congress intended that local government recipients have discretion in allocating federal payments under the statute. Committee reports and congressional debate indicate that there were to be no restrictions on use of the funds and that the payments were designed to enable local governments (as opposed to states) to meet a wide range of governmental needs related to activities on federal lands.

C. The Department of the Interior has consistently interpreted the Payments in Lieu of Taxes Act as requiring that payments under the Act be made to general purpose local government units and that those units retain the discretion to use the funds for any governmental purpose. That interpretation of the Act by the agency charged with its administration is entitled to deference.

D. The South Dakota statute interferes with the congressional purpose, even though it does not prescribe any particular formula or specify the programs for which the funds must be expended. The requirement that the federal payments be distributed in the same manner as taxes may prevent a local government from using federal funds where they are needed most. It is doubtful that local governments could adjust their budgets in advance to offset the effect of the state-mandated distribution scheme for

federal payments; in any event, local governments receiving those funds should not be required to engage in complex budgetary maneuvers in order to circumvent state intrusion on the federal program.

ARGUMENT

THE SOUTH DAKOTA STATUTE FRUSTRATES THE PURPOSES OF THE FEDERAL PAYMENTS IN LIEU OF TAXES ACT BY DEPRIVING LOCAL GOVERNMENT RECIPIENTS OF FEDERAL PAYMENTS OF DISCRETION IN DETERMINING HOW TO SPEND THOSE FUNDS

The South Dakota Supreme Court erred in holding that S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) is consistent with the federal Payments in Lieu of Taxes Act. The federal statute is properly read as conferring discretion on local governments to determine how they will spend the federal payments they receive under the statute. Because the state statute requires local governments to apportion those payments in a particular manner, it conflicts directly with the mandate of the federal statute and interferes with the accomplishment of Congress's goals.

It is well settled that " 'an unexpressed purpose to nullify * * * [state power] is not lightly to be attributed to Congress.' " *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103-104 (1980) (quoting *Parker* v. *Brown*, 317 U.S. 341, 351 (1943)). Where possible, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973) (quoting *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963)). Nevertheless, this Court has frequently reiterated that a state statute is void if it "stands as

an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, No. 81-1945 (Apr. 20, 1983), slip op. 11; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, to determine whether state and federal laws are in conflict it is necessary first to "ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9. See also *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

In light of these principles, we show below that the South Dakota statute is invalid under the Supremacy Clause to the extent it mandates a particular allocation of payments received by local governments under the federal statute.

A. The language of the Payments in Lieu of Taxes Act indicates that local governments that receive funds under the Act are to have complete discretion in expending or allocating those funds. 31 U.S.C. 6902(a) states that units of local government "may use" payments under the Act "for any governmental purpose." The import of this broad language is that recipients of federal payments may choose how to apply them, so long as the funds are used for some valid governmental purpose. There is no suggestion in the language that any entity other than the recipient

may impose constraints on the manner in which the payments are spent.

The federal statute also makes it clear that payments are to be made directly to general government units, not to special purpose units such as school districts; indeed, appellee has admitted as much (Mot. to Aff. 2, 7). Under the recently amended version of 31 U.S.C. 6901(2), a "unit of general local government" is defined as a political subdivision that is "the principal provider * * * of governmental services" (including, *e.g.*, public safety, social services, and transportation) within a state. The previous version of Section 6901(2) defined "unit of general local government" as a "general purpose political subdivision of a State." Thus, it is general purpose units, such as appellant Lawrence County, that are entitled to receive the federal funds and to decide how they will be spent.

While a county may choose to allocate some federal in lieu of taxes funds to school districts, it need not do so. In explaining the Payments in Lieu of Taxes Act, the court in *Altus-Denning School District No. 31* v. *Franklin County*, 568 F. Supp. 95, 101 (W.D. Ark. 1983), correctly noted (emphasis in original):

> [E]ven though Congress no doubt intended for some of the in lieu of tax funds to go to school districts, believing that the counties would disburse these funds with prudence, equity, and an eye to the obvious needs of the school districts, Congress nonetheless expressly allowed whichever unit constitutes the "unit of local government" of [31 U.S.C. 6901] to expend these funds for *any* governmental purpose.[7]

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[7] Ark. Stat. Ann. § 80-726 (repl. 1980), the state statute at issue in *Altus-Denning School District No. 31*, required county

See also *Kendall* v. *Towns County*, 146 Ga. App. 760, 762, 247 S.E.2d 577, 579 (1978).[8]

The South Dakota Supreme Court construed the language of the Payments in Lieu of Taxes Act as signifying only a requirement that funds be used for some governmental purpose, reflecting congressional indifference whether the funds were ultimately paid over to school districts or some other public body. In the court's view, the language of the federal statute does not preclude a state requirement that local governments pay the federal funds to school districts.[9]

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treasurers to apportion to school districts any funds received from income from national forests. The district court concluded that, assuming arguendo that the Arkansas statute applied to funds under the Payments in Lieu of Taxes Act, the state statute would be invalid under the Supremacy Clause because it would conflict with the "any governmental purpose" language of the federal statute. 568 F. Supp. at 102.

[8] Another provision of the federal statute, 31 U.S.C. 6904(b), provides additional support for this conclusion. Section 6904(b) provides expressly that in the case of certain additional short-term federal payments in connection with acquisition of park or wilderness areas, the Secretary "shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest." The express directive in Section 6904(b) reinforces the conclusion that Congress did not wish funds authorized under 31 U.S.C. 6902(a) to be earmarked for school districts, but rather intended for local governments themselves to have the discretion to allocate such funds. See *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

[9] The South Dakota Attorney General has also suggested that the federal statute does not make it unlawful for a state legislature to require that federal in lieu of taxes payments be used in a manner similar to other tax monies raised by the county. 1979-1980 S.D. Att'y Gen. Biennial Rep. 147, 149 (Official Op. No. 80-12). That opinion notes (*ibid.*), however,

It is conceivable that the words "may use" in 31 U.S.C. 6902(a) could be read in the manner chosen by the South Dakota Supreme Court. Cf. H.R. Rep. 97-651, 97th Cong., 2d Sess. 2 (1982). However, in our view, this reading of the federal statute is not the most natural one. The words "may use," employed in conjunction with the reference to "any" governmental purpose, appear on their face to give local governments the discretion themselves to choose the governmental purposes for which they will use the funds.

B. Even if the language of the Payments in Lieu of Taxes Act were not decisive, the legislative history clearly supports our reading of the statute.[10] That history indicates that Congress intended not only that local governments receive increased levels of federal funding as a result of the Payments in Lieu of Taxes Act, but also that they have discretion in allocating those funds. Both congressional committees that considered the legislation stated unequivocally that "payments under [the Payments in Lieu of Taxes Act]

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that "it is not the role of the Attorney General's Office to advocate the unconstitutionality of state statutes."

The South Dakota Attorney General was notified of the challenge to the state statute in this case (see J.S. App. 9a), but apparently chose not to participate. The State was a party to the earlier proceedings in federal court. See page 6, *supra*.

[10] The South Dakota Supreme Court found it unnecessary to examine the legislative history because it viewed the language of the statute as "plain, clear and rational" (J.S. App. 3a). As we have shown, the court appears to have misread the statutory language. But in any event, the court clearly erred in declining to examine the legislative history and underlying purpose of the statute. See *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 15-16; *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-11 (1976).

should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purposes." S. Rep. 94-1262, *supra*, at 15; H.R. Rep. 94-1106, 94th Cong., 2d Sess. 12 (1976). During both the House and Senate debates, the legislation was described by its sponsors as giving local governments the discretion to determine how the funds should be spent. Representative Quillen stated: "The funds are not earmarked for specific purposes such as roads or schools. Rather, *the local governments are given the discretion to use these moneys as they determine*, which is as it should be." 122 Cong. Rec. 25742 (1976) (emphasis added). Senator Moss explained: "Payments under H.R. 9719 are to go directly to the units of local government since it is the local governments that assume the burden for the tax immunity of these lands and *the payments may be used for any purpose the receiving governmental unit determines.*" *Id.* at 34596 (emphasis added).

In providing that local governments were to be the recipients of the payments under the new statute, Congress expressly rejected as unsatisfactory the scheme of many of the existing impact aid programs under which states (rather than local governments) received funds and decided how they would be distributed. S. Rep. 94-1262, *supra*, at 9 (noting that, under existing programs, "[i]n far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those

in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt"); *id.* at 15.[11] The Senate committee noted that it is local governments that bear the burden of providing a wide variety of services related to the presence of federal land within their boundaries (*id.* at 8-9):

> These lands attract thousands of visitors each year, yet the intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands.

Congress also expressed dissatisfaction with the earmarking of funds that had resulted either from federal statutory requirements or the fact that states controlled the distribution of funds under some programs. The Senate committee noted that use of funds under existing programs was often restricted to construction and maintenance of roads and schools (S. Rep. 94-1262, *supra*, at 9), but that the range of local government needs was in fact much greater (*ibid.*):

> [L]ocal governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recrea-

[11] Contrast, *e.g.*, *Rogers* v. *Brockette*, 588 F.2d 1057, 1071-1073 (5th Cir.), cert. denied, 444 U.S. 827 (1979), in which the court found no indication that Congress had intended to exclude states from the administration of a federal subsidy program.

tion; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

In addition, Members of Congress called attention to the budgeting difficulties created by the fluctuations in revenue under existing impact aid programs and the need of local governments for funds that could be applied flexibly to fund priority projects. See, *e.g.*, 122 Cong. Rec. 25747 (1976) (statement of Rep. Weaver) (noting fluctuations in revenue under existing impact aid programs); *id.* at 25752 (statement of Rep. Alexander) (noting immediate need for federal payments to continue construction of a new school building in Stone County, Arkansas, since maximum allowable increase in local taxes did not yield sufficient funds); *id.* at 25755 (statement of Rep. Holt) (noting difficulties caused by annual fluctuations in impact aid).[12] Thus, it was an important purpose of the new statute to give local governments control over federal funds and the freedom to allocate them in a manner that would allow satisfaction of the wide range of needs for governmental services that arise from the presence of federal lands. See *id.* at 25754 (statement of Rep. McCormack)

[12] See also *Payments in Lieu of Taxes: Hearings on H.R. 9719 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 146 (1976) (statement of Kenneth Lee, Lincoln County commissioner) (noting that "five or six different things hit us in one year," including a criminal trial costing the county $25,000 for a transient murder committed in Lincoln County); *id.* at 280-281 (statement of Rep. Simon) (noting need for flexibility in distribution of federal funds, since "the need in Pope County is not for the schools").

(new legislation "will now assure the counties a definite amount that will not fluctuate with lease production abilities and will not be specifically earmarked for schools and roads but can be expended on the basis of priority need so that each county can now budget accurately").

A subsequent amendment to the Payments in Lieu of Taxes Act sheds further light on Congress's intent in enacting the original statute. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). In 1983, Congress amended the Act to authorize states to make limited redistributions of payments among units of general purpose local government within the same county. Pub. L. No. 98-63, § 3(4), 97 Stat. 324, to be codified at 31 U.S.C. 6907. See J.S. App. 36a. The 1983 amendment was passed in response to *Meade Township* v. *Andrus*, 695 F.2d 1006 (1982), in which the Sixth Circuit held that the Secretary of the Interior had exceeded his authority under the Payments in Lieu of Taxes Act in refusing to provide for payments to townships as well as counties in Michigan. See 129 Cong. Rec. S8444 (daily ed. June 15, 1983). The fact that Congress found it necessary to provide expressly that a state may reallocate funds received by local governments in specified circumstances lends additional weight to the conclusion that, in the absence of such a provision, Congress did not intend that states be able to dictate the distribution of in lieu of taxes payments.

C. The Department of the Interior—the agency charged with administration of the Payments in Lieu of Taxes Act—has consistently interpreted that statute as requiring that federal payments be made to general purpose local government units and that those units retain the discretion to use the funds for any governmental purpose they choose. The Department promulgated 43 C.F.R. Subpt. 1881 in 1977, soon

after passage of the Act. 43 C.F.R. 1881.0-5(b)(2) makes clear that school districts may not receive funds directly. It provides: "The term 'unit of general government' excludes single purpose or special purpose units of local government such as school districts or water districts." See also 42 Fed. Reg. 51580, 51581 (1977) (counties are the appropriate recipients of in lieu of taxes funds in South Dakota). 43 C.F.R. 1881.2 states that payments made to local governments (with the exception of the special payments authorized by 31 U.S.C. 6904(b)) may be used for any governmental purpose.[13] The Department's interpretation of the Act as foreclosing either direct payments to school districts or limitations on use of the funds is entitled to deference. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31-32 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[14]

D. Appellee appears to contend (Mot. to Aff. 8-9) that the South Dakota statute does not interfere significantly with the discretion of counties to allocate

[13] See also 58 Comp. Gen. 19, 24 (1978), in which the Comptroller General, in the course of responding to an inquiry from the Interior Department concerning computation of federal in lieu of taxes payments, noted that it was "obvious" from the legislative history that Congress was concerned that such funds "should be distributed to the local governments, who then were to make the necessary decisions on how to distribute them to meet their internal needs."

[14] Two courts have found the Secretary's regulations to be consistent with the federal statute in not requiring payment of federal in lieu of taxes funds to school districts. See *Altus-Denning School District No. 31* v. *Franklin County*, 568 F. Supp. at 101; *Kendall* v. *Towns County*, 146 Ga. App. at 762, 247 S.E.2d at 579.

the federal payments they receive, since the state statute does not prescribe any particular formula or specify the programs for which the funds must be expended, but merely directs the recipient counties to allocate the federal moneys "in the same manner as taxes are distributed." But however appropriate that general direction may appear on a superficial glance, it nevertheless represents a not insignificant limitation on the discretion of counties to choose how they will spend the federal payments. A county's needs may not necessarily correspond to the manner in which its taxes are distributed. For example, an unexpected need for funding a particular activity (*e.g.*, a trial in connection with a major crime committed by a visitor to a national forest) might prompt a county to devote all of its federal in lieu of taxes payments to that activity in a particular year. See page 16 & note 12, *supra*. Alternatively, state statutes may require that some programs be fully funded by local taxes, so that the county normally would choose not to devote its share of federal in lieu of taxes payments to those programs, but instead to cover shortfalls in other programs. For example, South Dakota law appears to require county auditors to set a levy on taxable property at a rate sufficient to meet the school budget. S.D. Codified Laws Ann. §§ 10-12-29, 13-11-3 (rev. 1982). See *Rapid City Area School District No. 51-4* v. *Pennington County Auditor*, 284 N.W.2d 308 (S.D. 1979). To the extent S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) prevents counties from applying the federal in lieu of taxes payments to programs for which the funds are most needed, it frustrates Congress's intent that local governments have such discretion and that they have funds that could be used to provide the services

to federal lands with which Congress was most concerned.[15]

It might be argued that a county could use creative budgeting to avoid the effect of the state restriction on allocation of federal payments. We doubt that such an approach would be feasible. As noted above, there are state statutes governing funding of the school budget. Thus, a county apparently may not reduce a school district's share of local taxes in anticipation that federal in lieu of taxes payments would meet any shortfall. Even if counties were free to expend or allocate locally raised taxes as they wished, it is doubtful that they would be able to adjust their tax distribution plans in such a way as to avoid any increment to a fully funded activity (*e.g.*, a school district) by virtue of the federal payments. As Congress recognized (see page 16, *supra*), county revenues, including other federal impact program funds, some of them specially earmarked, vary from year to year.[16] Counties must budget in advance, often long

[15] The South Dakota Supreme Court appears to have believed that a conflict between the federal and state statutes would not exist unless Congress had actually prohibited federal in lieu of taxes payments from being used for school districts. See J.S. App. 4a. This overlooks the importance of Congress's concern that local governments themselves exercise discretion in choosing how to allocate the federal payments. As we have explained, such discretion can be of considerable significance in enabling a local government to meet the need for services created by the presence of federal lands within its boundaries. A state statute that limits local government discretion can therefore be regarded as conflicting with the congressional scheme, even in the absence of any express prohibition on use of the federal funds.

[16] Thus, counties are subject to greater uncertainty in budgeting than if they received a single federal payment measured as the equivalent of the amount they would receive if federal lands were subject to local taxation.

before they actually receive federal impact aid funds or in lieu of taxes payments. Moreover, the State presumably retains power to control a county's expenditure of nonfederal funds and might well intervene if a county were seen to be evading the intent of the State directive.

At all events, the counties receiving in lieu of taxes payments from the United States ought not be pushed into complex schemes to circumvent state intrusion. The purpose of these federal payments is to give local governments a minimum amount of federal money to use at their discretion to fill in gaps, to reduce fiscal and budgetary swings, and to allow more effective planning. This can be accomplished only through local control and decisionmaking, unconstrained by directives contained in state statutes.

E. It is thus clear that S.D. Codified Laws Ann. § 5-11-6 (rev. 1980) conflicts with the federal Payments in Lieu of Taxes Act. The South Dakota statute requires localities to expend the federal in lieu of taxes payments in a particular manner; that is inconsistent with the language and legislative purpose of the federal statute, under which local governments are to have discretion in apportioning the payments. The federal statute, read in the light of the underlying congressional purpose, leaves no room for such state interference with local discretion. Cf. *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. at 318; *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 583-585 (1979); *Hergenreter* v. *Hayden*, 295 F. Supp. 251 (D. Kan. 1968); *Shepheard* v. *Godwin*, 280 F. Supp. 869 (E.D. Va. 1968).[17] Since the va-

[17] In *Hergenreter* and *Shepheard*, state statutes required deduction from a school district's share of state educational funding of amounts equivalent to certain federal payments made to school districts impacted by the presence of federal

lidity of the federal law is not in doubt,[18] it follows that, to the extent the South Dakota statute purports to affect the distribution of federal in lieu of taxes payments, it is invalid under the Supremacy Clause.

CONCLUSION

The judgment of the South Dakota Supreme Court should be reversed.

Respectfully submitted.

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land and federal employees. In both cases, three-judge courts held the statutes invalid on the ground that they conflicted with the purpose of the federal program, which was to supplement local revenues, not to replace them.

[18] It is indisputable that the federal government has authority to fix the terms on which it disburses federal funds. See, *e.g.*, *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 17 (1981). Of course, we do not suggest that the Payments in Lieu of Taxes Act places any constraints on a state's ability to control the use of *state* in lieu of taxes payments (*i.e.*, payments from the state to counties on account of tax-exempt state lands). Nor does the federal statute impose any limitations on the manner in which states perform their functions or on their relations with counties.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421933 579

MOTION FILED
JUN 11 1984

No. 83-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,

Appellants,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,

Appellee.

On Appeal From The Supreme Court Of The State Of South Dakota

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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Appellee.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

Pursuant to Rule 36.3 of the Rules of this Court, the National Association of Counties ("NACo"), fourteen state county associations and 77 individual counties (the "Counties")[1] respectfully move this Court for leave to file a brief as *amici curiae* in support of Appellants. Appellants Lawrence County and the Lawrence County Commissioners have consented to the filing of this brief. Appellee Lead-Deadwood School District No. 40-1 has refused consent to the filing of this brief by NACo and the Counties.

[1] A complete listing of the individual NACo member counties and non-member counties and state associations of counties joining in this motion are attached as Appendix B to brief of *amici*.

As noted in the "Interest of *Amici Curiae*", NACo's member counties,[2] as well as certain non-member counties, who have joined in this motion and brief, are "units of general local government" which receive funds from the federal government under the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 6901-07 ("PILT").[3] The importance of PILT payments to these counties is substantial. PILT provides that the payments under Section One of the Act go directly to local governments and are to be used by them for any governmental purpose. 31 U.S.C. § 6902. The South Dakota statute which is the subject of this appeal restricts that discretion by predetermining the governmental purposes for which the *amici* and other counties and local governments could expend PILT payments.

This case, therefore, presents issues of overwhelming national importance to *amici*—the constitutionality of a state law which purports to change the scheme of payments under PILT. This impacts the Counties' budgets, as the PILT funds are compensation for the loss of tax

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[2] NACo is the only national organization representing county governments in the United States. Through its membership urban, suburban and rural counties join together to build effective and responsive county government. The goals of the organization are to: improve county government; serve as the national spokesman for county government; act as a liaison between the nation's counties and other levels of government; and achieve public understanding of the role of counties in the federal system. NACo currently represents 1850 of the nations 3105 counties and, through them, about 204 million Americans, approximately ninety percent of the population of the United States.

[3] The Secretary of the Interior has determined that in most instances counties are the unit of general local government entitled to receive PILT funds. 43 C.F.R. § 1881.0-5(b)(1).

bases due to the presence of federal lands, as well as the continued and effective provision of local services to the federal lands and operation of the national PILT program. Any redirection or redistribution of PILT payments threatens the ability of *amici* to accomodate the budgetary problems associated with federal lands. Without the unrestricted use of the PILT payments, as directed in PILT and as made clear in PILT's legislative history, many of *amici* will face extraordinary budgetary and economic strain.

The decision of the Supreme Court of South Dakota could be used as authority for other states to legislatively misdirect their counties' PILT payments. *See, e.g.*, Ark. Stat. Ann. § 80-726. This would threaten a substantial and important federal program, compromise the counties' existence and disserve Congress' express purpose of compensating the units of local government closest to the federal lands and most sensitive to the costs and needs of the community embracing those lands.

The Supremacy Clause issues here rise in a unique situation. This is not a case where federal law suppresses or infringes on a state's or local government's rights. Congress here established a federal entitlement program which enhances—*without* restriction—local government operations. It is the challenged state law which attempts to restrict those operations and, therefore, to suppress those rights.

Amici firmly believe that the South Dakota statute is unconsitutional for conflicting with Congressional purpose as expressed in PILT's terms and legislative history. Only this Court can authoritatively resolve this issue and determine that neither the state legislatures nor any state agency or bureaucratic officers may interfere with

the PILT program. The participation by NACo and the Counties will be of benefit to the Court by insuring a presentation of the full range of issues involved and amplify the deleterious effect that upholding the South Dakota Supreme Court's decision would have on this nation's counties, the PILT program and the continued maintenance of this nation's public lands. To this end, NACo passed a resolution registering its support of Appellants and has received similar resolutions from many member and non-member counties, all seeking to participate in this appeal and support Appellants. *See* Appendices A and B to Brief of *Amici*. NACo's *American County Platform* also contains statements of basic policy and resolutions supporting the continued funding and full operation of the PILT program. *See* Appendix C to Brief of *Amici*.

It is therefore respectfully requested that NACo and the Counties be given leave to file the accompanying brief as *amici curiae* in support of Appellants.

Dated: June 11, 1984

Respectfully submitted,

/s/ Frederic Lee Ruck
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-240

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,
Appellants,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,
Appellee.

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS.

The National Association of Counties ("NACo") and individual member and non-member counties and states' associations of counties (the "Counties") join in their support of Appellants and respectfully pray the Court reverse the decision of the Supreme Court of the State of South Dakota.

INTEREST OF *AMICI*

This appeal seeks a determination of whether a state may legislatively redirect payments made to units of general local government, which for the most part are counties, under the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 6901-07 ("PILT"). The issues raised in this appeal are of vital importance to *amici*.

Amici Counties, including those that are members of NACo, all receive payments from the federal government under PILT.[4] *Amici's* interest and need in preserving these payments for their discretionary use, *i.e.*, for any governmental purpose, will be directly affected by the Court's action with respect to this appeal. It is they who will bear the substantial, direct and immediate impact of any alteration of the scheme of payments under PILT.[5]

It is *amici's* position that the attempt by the South Dakota legislature to redirect Appellants' PILT payments is unconstitutional under the Supremacy Clause of the United States Constitution. *Amici* also believe that the South Dakota Supreme Court committed substantial error in failing to properly analyze congressional purpose and intent when it upheld the challenged South Dakota statute. Congress' determination that the units of local government closest to the federal lands should receive and disburse PILT payments according to *their* needs without state interference is clearly stated in PILT and its legislative history. Unless this Court reverses the decision below and finds the South Dakota statute unconstitutional, the Counties stand to lose control of all or a portion of their PILT funds. Arkansas already has a statute which purports to redirect PILT payments and

[4] The Act specifically defines the recipients of PILT payments to be units of general local government which provide "general governmental services" and lists counties, *inter alia*, as examples. 31 U.S.C. § 6901(2). The Secretary of the Interior is obliged to determine the appropriate unit, which has been determined to be in most instances, counties. 43 C.F.R. § 1881.0-5(b)(1).

[5] PILT payments in 1983 were approximately $96 million to over 1700 counties in 49 states and the District of Columbia. *See* Appendix D.

which was recently challenged in *Altus-Denning School District No. 31* v. *Franklin County*, 568 F.Supp. 95 (W.D.Ark. 1983).[6]

The issue of the state's power to legislate with respect to PILT funds is, therefore, of vital interest to *amici*. NACo's basic philosophy and indeed formal resolutions with respect to public lands generally, is to support the full payment of PILT funds for the unimpeded distribution to the counties and to pursue legislation to that end. Appendix C. The participation by NACo and the counties, both committed to the unhampered and continued operation of PILT, will assure the presentation and briefing of the full range of issues before the Court. *Amici* will outline the practical aspects of the PILT program and the potentially disasterous effects its possible curtailment will have on units of local government throughout the country.

SUMMARY OF ARGUMENT

PILT provides a necessary stream of payments to units of local government to compensate them for the costs and burdens of supporting tax-exempt federal lands within their boundaries. Congress directed these payments to the local governments closest to the lands, realizing: (1) that the associated costs and burdens would vary by category and location; and (2) that the states would not necessarily direct funds to the areas needing them most.

[6] Ark. Stat. Ann. § 80-26 sought to redistribute funds received on account of national forest lands to school districts. Although the court found the scheme void because the Secretary of the Interior's regulations excluded school districts, the court also reasoned that, to the extent the state statute conflicted with PILT's own terms, it was void under PILT as well. *Id.* 568 F.Supp. at 102.

Accordingly, Congress did not earmark or restrict the payments, but gave them to the local governments to be spent in *their* discretion.

The South Dakota statute which is the subject of the instant appeal purports to alter Congress' scheme and change the intended initial recipient and decision-maker with respect to the use of PILT funds. The South Dakota law's redirection conflicts with PILT's grant to the *initial* recipient, the unit of general local government, the right to determine the *ultimate* use of the funds. A state is without the power, under the Supremacy Clause, to amend PILT in this manner. Similarly, a state is without authority under PILT to pre-determine for local governments within the state which governmental purposes are appropriate for expenditures of PILT funds.

A fragile balance always exists among the various levels of government, the requirements for providing needed public services, and the funds necessary to carry out those functions. This is particularly true where the federal government itself, by the ownership and operation of public lands, creates the need for services to be provided by another level of government. With PILT, Congress specifically determined that the burdens created by the existence of federal lands are those which impact local government. Congress therefore created a reimbursement system which permits local governments to determine the services required by the existence of the federal lands, to determine which departments, agencies or units of local government should satisfy those needs, and to allocate and use federal funds in their sole discretion to partially recoup the losses otherwise incurred by these local governments. Unlike other schemes of federal payments, PILT has explicitly removed the state governments from participation in service or funding decisions.

Upholding South Dakota's statute, or a similar action of any state, would frustrate local needs and allocations, and would also frustrate the intent of Congress as well as the effectiveness of a program designed to support local governments in servicing legitimate federal interests. It is this unwarranted intrusion by state action which threatens the ability of local governments to respond to needs created by the federal government and, in fact, the viability of PILT itself.

ARGUMENT

I. PILT Provides A Comprehensive Scheme For Alleviating The Burdens On Local Governments Of Supporting Public Lands

The presence of federal or "public" lands within this country's local communities presents a patchwork quilt of benefits, problems and issues that often predominate over many other local concerns. The more common of these issues, as recognized in the PILT legislation, is that the land's presence removes from local government the predominant, and often the only, source of income—real property tax assessments. Other traditional tax sources—income, sales, excise, corporate and licensing—are generally reserved to the states and, although locally generated, are usually reapportioned or sent back to the local communities in part and by state-wide appropriation only.[7]

The Payment In Lieu Of Taxes Act was enacted in response to these problems. It is a rare and unique federal program directing funds to units of local government

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[7] This generalization does not of course apply to all units of local government in all of the states; some local governments do possess income or sales taxing power.

which most immediately experience the impact and problems associated with the presence of federal tax-exempt lands within their boundaries.[8] These lands demand a variety of services yet do not usually produce any income as they are tax-exempt.[9] PILT directs the funds, and most importantly their control, to the affected persons, those units of local government closest to federal lands.[10] Without local direction and control it is doubtful, indeed highly improbable, that the federal funds will ever reach the source of problems for which they were designed to compensate.

The presence of federal property and removal of property tax base also impacts local governments by the removal of lands from development and occupancy by any permanent residential population—frequently only a transient population is attracted. Where there is substantial federal land present, there is generally a smaller residential population. The practical political impact of a sparse residential population with a smaller voting population results in a softer voice in state capitals where the concerns understandably are to meet the needs of more

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[8] *See* S.Rep. No. 1262, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.Code Cong. & Ad. News 5968 ("S.Rep. 1262"); H.R.Rep. No. 1106, 94th Cong., 2d Sess. (1976) ("H.R.Rep. 1106") Portions of these reports are reprinted in the Appendix to Appellants' Jurisdictional Statement ("Juris.St.App.").

[9] Some federal lands are income-producing and Congress shares portions of those revenues with local and state governments under various statutes. *See* 31 U.S.C. § 6903(a)(1). However, these funds are wholly inadequate to compensate for the costs of maintaining the *non* income-producing lands as well.

[10] Congress noted that the control should be in the hands of these local governments by directing that they are to be used by the local governments for "*any* governmental purpose." 31 U.S.C. § 6902.

vocal and populous constituencies. Those more vocal localities are oftentimes those with less federal lands. Yet the impact of problems generated by the presence of federal lands, as Congress has recognized, is most immediately felt within the local governmental unit. Most frequently, visitors are drawn to enjoy the federal property with the myriad of problems to local governments due to the public services that people require, and are entitled to expect, including police, fire, public health, judicial administration, water and other utilities, street and highway maintenance, and building inspection and control. In short, transient populations expect and require all the services that resident populations require (with the most apparent exception of schools) plus many more. Yet these transient populations frequently attracted by federal land do not figure in any state allocation of funds based on population, do not pay any property taxes, and as already mentioned, add no appreciable volume to the large chorus of voices demanding state government appropriations.

The corresponding benefits that population influx spawns are therefore more often funnelled to the state government. The substantial commercial activity and expenditures contributed by tourism, although sometimes made to local businesses, enhance the state's tax base in sales and income, while magnifying local costs but making no local tax contribution at all.[11]

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[11] In enacting PILT, Congress found that "[t]he intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands." S.Rep. 1262 at 9; Juris. St. App. at 16a.

Certain categories of federal lands, such as wilderness, attract relatively fewer transients or visitors. Indeed, their presence may be designed to discourage or repel local development. While this impact may be of no benefit to local commerce (a detriment in itself) the federal presence may be fully dependent on local support or services for even a bare minimum of public accommodation.[12]

Thus impact may be relatively substantial and only realized or appreciated locally. Recognition of costs and benefits to the broad spectrum of local communities is embodied in Congress' extraordinarily prudent PILT legislation allocating funds to those units of local government denied tax funds, to offset or meet the burdens of the presence of federal lands, to be expended for *any* governmental purpose.

It is the unit of local government that best understands and appreciates the impact and is best equipped to respond to the problems if given control of the funds. Even if states were to recognize the local impact, they might be politically or legally inhibited from reallocating them to where the impact is most immediately felt. Indeed, Congress found when it enacted PILT, that prior revenue sharing provisions which directed some funds to local governments (and often earmarked for schools and roads) did not provide the needed compensation to local governments of maintaining even those federal lands which were income-producing (S.Rep. 1262, Juris.St.App. at 16a-17a):

[12] For example, one search and rescue operation instituted by Clackamas County, Oregon, in the Mt. Hood National Forest (PILT lands) cost $24,000. *See* testimony of Tim Schultz on behalf of NACo before the Subcommittee on Interior of the House Committee on Appropriations, February 15, 1983.

> Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generated activities are felt . . .

Accordingly, the scheme envisioned by PILT is one of enhancing and encouraging local governmental operations. These considerations were paramount and are essential to effectuating Congress' intent in compensating the local communities for loss of their tax base and at the same time providing for the effective maintenance of these federal lands.

II. The States' Legislative Redirection Of PILT Funds Is Void Under The Supremacy Clause

The Supremacy Clause of the U.S. Constitution confers upon the federal government broad power to preempt state or local governments from local regulation in many substantial areas affecting the most fundamental community activity. Pervasive regulation has extended to almost every aspect of personal concern to the exclusion of the states. From the federal postal service and national defense, to regulation of atomic energy, current federal programs have become the predominant government presence in every U.S. community.[13] The federal government also concurrently regulates conduct along

[13] *See, e.g.*, Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. ____, 103 S.Ct. 1713 (1983); Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141 (1982); Jones v. Rath Packing Co., 430 U.S. 519 (1977).

with the states and local governments by issuing standards and guidelines for health care, agricultural support and plantings, advertising, working conditions, conditions of employment, telecommunications, home building and mortgages and, not least of all, taxes.

Understandably, the federal presence is felt all the more in communities where the local neighbor and landowner is the federal government. While many federal regulatory programs are resented as a source of encroachment on individual conduct, many are necessary in a nation of integrated commerce and national interest. Although the Supremacy Clause has often been invoked to impose a federal program and suppress a conflicting state interest or local program,[14] here it has ironically been invoked *not* to curtail or reduce local government *but* to protect and enhance it. The PILT program and its Supremacy Clause protection promotes local government by allowing those most immediately affected by the presence of federal lands to deal with the impact in the manner most suitable to them. This demonstrates an enlightened federal attitude in its recognition that many problems created by a federal presence are best resolved by units of *local* government—the government closest to the community and responsible for making the day-to-day decisions on the effective provision of governmental services to that community. In this instance the Supremacy Clause is not a doctrine of federal encroachment, but a protection against encroachment by the states.[15]

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[14] *See, e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

[15] *See, e.g.*, Hergenreter v. Hayden, 295 F.Supp. 251 (D.Kan. 1968); Shepheard v. Godwin, 280 F.Supp. 869 (E.D.Va. 1968). The potential deleterious effects of such encroachment here is magnified by the fact that one of *amici*, Otero County, New Mexico, has 1.5 million acres of entitlement lands within its boundaries and its PILT receipts amount to 77 percent of its general fund operating expenditures.

On occasion, a federal program is imposed with impersonal and unconcious bureaucratic efficiency and results in suppression of individual liberties. In contrast, and not infrequently, a state regulatory program is enacted with careful design to promote a particular interest or region with a corresponding diminution or suppression of competing interests and regions. Within a state, regional interests are often more sharply defined and felt than broader national sections. In such a political climate, pervasive state regulation or a strong central state government may invade or impact on individual conduct and freedom more than the impersonal federal programs.

The instant case is apparently such an example. The state government in South Dakota seeks to override the federal statute's conferrence upon local governments of the right to determine the appropriate expenditures of PILT funds.[16] The state statute would channel funds to the school and other special districts in contravention of express local control and determination of governmental use. This is in complete disregard of the purpose and basis for which the federal funds were appropriated—to offset the impact of the presence of federal lands within *local* governments' boundaries that do not provide a source of tax revenues. School support, while a laudable and indeed most appropriate governmental purpose, ordinarily

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[16] Congress found that restrictions on the use of funds created undue difficulty for the local governments. "It is only the most fortunate of local governments which is able to juggle its budget to make use of . . . earmarked funds in a manner which will accurately correspond to its community service and facility needs." S.Rep. No. 1262 at 9; Juris. St. App. 16a.

bears little relationship to federal land. As Appellants point out in their brief, public lands most frequently result in a reduction of school population and thus, if anything, a reduction of impact on this important element of public service.[17] Where there is an increase due to the presence of school children on the federal lands, the schools are provided for with Section Three PILT payments and other impact aid.[18] Direction of Section One funds to school districts means subsidizing communities and schools not impacted by the presence of federal lands. Such a reallocation undermines the federal program and, more importantly, it unfairly and unjustly allocates funds to the more populated regions and communities beyond the affected areas and thus further undermines the concept of local governance.

A persistent criticism of federal regulation is its overlapping inconsistency and sometimes conflicting nature with local needs and regulations. Because of the redirection and reallocation of PILT funds under the South Dakota statute challenged by Appellants, the state contributes to this overlapping and inconsistency. As the dissent reasoned in the court below, Congress "was directing the states to keep their noses out of the manner in which a county would distribute [PILT] funds." *Lead-Deadwood School District No. 40-1* v. *Lawrence County*, ____ S.D. ____, 334 N.W.2d 24, 27 (1983) (Juris. St. App. at 6a). South Dakota's redirection of PILT funds to school districts, in defiance of a stated different federal purpose and intent, is an invitation to eliminate a program de-

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[17] The South Dakota statute would require, however, that sixty percent of Appellants' PILT funds go directly to the school districts in Lawrence County.

[18] *See, e.g.*, 31 U.S.C. § 6904; 20 U.S.C. § 236.

signed to meet local needs and further the effectiveness of local government. South Dakota's restructuring of this important federal program is at best parochial and at worst unenlightened. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, *amici* respectfully join in Appellants' request for this Court to reverse the decision of the South Dakota Supreme Court.

Dated: June 11, 1984

Respectfully submitted,

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APPENDIX A

RESOLUTION SUPPORTING A BRIEF *AMICUS CURIAE* BEFORE THE U.S. SUPREME COURT IN THE *LAWRENCE COUNTY* v. *LEAD-DEADWOOD SCHOOL DISTRICT* CASE

WHEREAS, the Payments-in-Lieu-of-Taxes (PILT) Act, and its legislative history, vests total discretion in the counties with respect to the distribution of PILT funds, and the states may not dictate the manner of distribution; and

WHEREAS, currently before the U.S. Supreme Court is an appeal, *Lawrence County et. al.* v. *Lead-Deadwood School District No. 40-1*, concerning the purposes and objectives of the PILT Act; and

WHEREAS, in that appeal the U.S. Supreme Court will determine whether or not a state can direct how counties distribute their PILT payments; and

WHEREAS, Lawrence County, South Dakota, is urging on appeal that a state may not so direct PILT payments and seeks reversal of the decision affirming such state authority by the South Dakota Supreme Court;

THEREFORE, BE IT RESOLVED, that NACo strongly supports Lawrence County in its appeal pending before the U.S. Supreme Court; and

BE IT FURTHER RESOLVED, that NACo, together with any interested county and state association of counties, file a brief *amicus curiae* in the U.S. Supreme Court backing up NACo's support of Lawrence County, and urging reversal of the decision of the South Dakota Supreme Court.

APPENDIX B

COUNTIES AND STATE ASSOCIATIONS OF COUNTIES THAT HAVE REQUESTED TO JOIN WITH NACo IN A BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Arizona
Mohave County

Arkansas
Association of Arkansas Counties (75)

California
County Supervisors Association of California (58)
Humboldt County
Mono County

Colorado
Colorado Counties, Inc. (62)
Conejos County
Eagle County
Lake County
La Plata County
Mesa County
Rio Grande County
Saguache County
San Miguel County

Florida
Collier County

Georgia
Association County Commissioners of Georgia (157)
Jasper County
Lumpkin County
McDuffie County
Quitman County
Walker County
Wilkes County

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* Numbers in parentheses denotes the number of counties in the state association joining in this brief.

Idaho
Idaho Association of Counties
Caribou County
Power County

Iowa
Iowa State Association of Counties (99)

Maryland
Maryland Association of Counties, Inc. (24)

Minnesota
Association of Minnesota Counties
Aitkin County
Beltrami County
Carlton County
Cass County
Chisago County
Cook County
Crow Wing County
Dakota County
Goodhue County
Houston County
Hubbard County
Itasca County
Koochiching County
Lac Qui Parle County
Lake County
Lake of the Woods County
Otter Tail County
Pine County
Pipestone County
Roseau County
St. Louis County
Traverse County
Wabasha County
Washington County
Winona County

Missouri
Missouri Association of Counties (110)

Montana
Montana Association of Counties (51)

Nevada
Douglas County

New Mexico
New Mexico Association of Counties (33)
Chaves County
Dona Ana County
Eddy County
Harding County
Lea County
McKinley County
Otero County
Quay County
Rio Arriba County
San Juan County
Socorro County
Torrance County

Oregon
Crook County

South Dakota
South Dakota Association of County Commissioners (66)
Dewey County

Utah
Box Elder County
Carbon County
Daggett County
Garfield County
Grand County
Millard County

Salt Lake County
San Juan County
Sanpete County
Sevier County
Tooele County
Utah County
Washington County

Virginia
Allegheny County
Bath County
Campbell County

Washington
Washington State Association of Counties (39)
Skagit County

Wisconsin
Wisconsin Counties Association (72)

APPENDIX C

THE AMERICAN COUNTY PLATFORM AND RESOLUTIONS 1983-84

Section 10—PUBLIC LANDS

10.8 PAYMENTS-IN-LIEU-OF-TAXES

Where a system of payments does not adequately replace state and local taxes on federally owned, tax-exempt lands, a payment-in-lieu-of-taxes should be made by the federal government directly to the states for automatic and unimpeded distribution to counties where federally owned lands are located, to provide full tax equivalence as though the property were in private ownership. Extraordinary benefits and burdens should be treated separately and payments made accordingly.

10D. Resolution on Payments-in-Lieu-of-Taxes Entitlement Legislation

WHEREAS, a payments-in-lieu-of-taxes program, to recognize the tax immunity of federal lands, has been recommended by the Public Land Law Review Commission, the Advisory Commission on Intergovernmental Relations, and the National Association of Counties; and

WHEREAS, the Congress has stated its intention to make payments-in-lieu-of-taxes as a policy in the Federal Land Planning and Management Act of 1976; and

WHEREAS, the Congress enacted P.L. 94-565 to provide a fair and equitable formula for payments-in-lieu-of-taxes after thorough study and hearings; and

WHEREAS, rescissions and appropriation cuts have been proposed or enacted virtually every year and have jeopardized the effectiveness of this important program, with the effect that the federal government is not fully

honoring its property tax commitment as other landowners must; and

WHEREAS, sufficient funds are available for royalties and revenues derived from the tax-exempt public lands to provide secure funding for the payments-in-lieu-of-taxes program;

THEREFORE, BE IT RESOLVED, that the National Association of Counties supports legislation to provide payments-in-lieu-of-taxes funding as an entitlement program utilizing mineral leasing royalties and revenues derived from the public lands; and

BE IT FURTHER RESOLVED, that the National Association of Counties is hereby requested to actively pursue such entitlement legislation.

APPENDIX D

PAYMENTS IN LIEU OF TAXES
Fiscal Year 1983 State Totals

STATE	(SCHEDULE 3) FEDERAL ACRES	(SCHEDULE 2) UNITS OF LOCAL GOV'T	SUMMARY OF PAYMENTS
Alabama	719,010	54	114,758
Alaska	82,049,201	12	3,671,945
Arizona	27,909,718	14	7,571,230
Arkansas	3,235,769	66	1,340,653
California	42,112,393	58	10,127,144
Colorado	23,278,966	60	6,978,006
Connecticut	8,657	15	14,527
Delaware	6,369	3	4,360
District of Columbia	6,943	1	5,831
Florida	2,184,830	43	1,715,928
Georgia	1,255,462	63	758,293
Hawaii	12,653	3	10,022
Idaho	32,660,848	44	7,065,943
Illinois	430,901	41	268,243
Indiana	298,734	33	222,273
Iowa	170,844	25	120,577
Kansas	541,692	49	318,425
Kentucky	1,083,628	73	669,904
Louisiana	701,484	42	172,254
Maine	85,606	21	103,320
Maryland	40,125	15	55,408
Massachusetts	35,758	60	62,441
Michigan	2,018,730	47	1,301,441
Minnesota	2,907,832	56	1,043,164
Mississippi	1,506,831	66	380,032
Missouri	2,033,617	72	773,646
Montana	27,125,090	56	7,292,394
Nebraska	494,229	39	276,543
Nevada	56,943,513	17	5,202,784
New Hampshire	726,777	56	294,227
New Jersey	36,609	12	53,835
New Mexico	22,419,918	32	9,163,185
New York	145,488	32	164,312
North Carolina	1,663,973	46	1,180,825
North Dakota	1,715,094	47	519,974
Ohio	289,368	53	370,175
Oklahoma	1,384,707	63	738,160
Oregon	28,971,237	36	2,580,305
Pennsylvania	641,076	46	318,626
Rhode Island	5	1	0
South Carolina	754,247	21	120,351
South Dakota	2,816,897	44	1,749,807
Tennessee	1,139,299	50	615,156
Texas	2,415,414	83	1,234,734
Utah	32,862,715	29	8,156,154
Vermont	296,311	48	108,471

Virginia	2,123,413	73	1,173,547
Washington	11,298,830	38	1,438,969
West Virginia	1,105,395	39	766,909
Wisconsin	1,331,694	40	542,842
Wyoming	29,582,378	23	7,019,336
TOTALS	455,623,945*	2,060**	$95,986,754

* Includes the Virgin Islands and Guam

** Includes units of local government that received no payments under the minimum exclusions. 31 U.S.C. § 6902(d)

Office - Supreme Court, U.S
FILED
JUN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS, *Appellants*,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1, *Appellee*.

On Appeal From The Supreme Court Of The State Of South Dakota

---

JOINT APPENDIX

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Appeal Docketed August 15, 1983
Probable Jurisdiction Noted March 26, 1984

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*"J.S.App." refers to the Appendix to Appellants' Jurisdictional Statement filed August 15, 1983.

IN CIRCUIT COURT
EIGHTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA
COUNTY OF LAWRENCE

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,
Plaintiff,

vs.

LAWRENCE COUNTY, and the
LAWRENCE COUNTY COMMISSIONERS,
Defendants.

COMPLAINT FOR WRIT OF MANDAMUS
(Chapter 21-29, SDCL)

Plaintiff pleads:

I.

The Lead-Deadwood School District is a political subdivision created by the statutes of the State of South Dakota, authorized to provide free public education to the residents of the District.

II.

Lawrence County and the Lawrence County Commissioners are political subdivisions of the State of South Dakota, which is the county governmental entity having jurisdiction in Lawrence County.

III.

The Lead-Deadwood School District No. 40-1 is contained within Lawrence County.

IV.

That Public Law 94-565, which is codified as 31 USC, Section 1601 et seq, authorizes the United States of America through the Secretary of the Interior to make payments on a fiscal year basis to Lawrence County, which payments are in lieu of real estate taxes.

V.

That SDCL 5-11-6 requires the County Auditor to distribute all Federal and State payments which are in lieu of tax proceeds in the same manner as taxes are distributed by Defendants.

VI.

That Defendants have received monies from the United States of America through the Secretary of the Interior under Public Law 94-588 [sic], codified as 16 USC, Sections 1601 et seq.

VII.

That upon information and belief, Plaintiff believes that the Defendants are in possession of $400,000+, which Defendants refuse to distribute under SDCL 5-11-6.

VIII.

That Plaintiffs do not have a plain, speedy and adequate remedy in the ordinary course of law.

WHEREFORE, Plaintiffs pray that the Court issue its Writ of Mandamus requiring the Defendants to distribute monies paid to them by the United States of America by and through the Secretary of the Interior under Public

Law 94-565, codified as 31 USC, Section 1601 et seq, pursuant to SDCL 5-11-6.

Dated this 15th day of February, 1982.

/s/A. P. Fuller
A.P. FULLER

(VERIFICATION AND JURAT OMITTED IN PRINTING)

(TITLE OMITTED IN PRINTING)

ANSWER AND AMENDED COUNTERCLAIM

Comes now the above named Defendants in Answer to Plaintiff's Complaint states and alleges as follows:

I.

Defendants deny each and every fact, matter or thing contained in Plaintiff's Complaint unless specifically admitted herein.

II.

Defendants move to dismiss said Complaint for failure to state a claim upon which relief can be granted.

III.

Defendants admit those allegations contained in Paragraphs I., II., III., IV., V. and VII. of Plaintiff's Complaint.

IV.

Defendants move to dismiss Plaintiff's Complaint for failure to join Sherryl Flanagan, Lawrence County Auditor, as an indispensable party.

AMENDED COUNTERCLAIM

Comes now Lawrence County, the Lawrence County Commissioners and Sherryl Flanagan, Auditor of Lawrence County, and counterclaims against Lead-Deadwood School District as follows:

I.

That Lawrence County and the Lawrence County Commissioners are political subdivisions of the State of

South Dakota, which is a County governmental entity having jurisdiction in Lawrence County.

II.

That Sherryl Flanagan is the duly elected and qualified Auditor for Lawrence County.

III.

That Lead-Deadwood School District No. 40-1 is a political subdivision of the State of South Dakota authorized to provide public education to the residents of said district in Lawrence County, South Dakota.

IV.

That Public Law No. 94-565 which is codified as 31 USC, Section 1601 et seq, authorizes the United States of America through the Secretary of the Interior to make payments on a fiscal year basis to Lawrence County, South Dakota.

V.

That said payments are made to Lawrence County because of the existence in Lawrence County of Federal entitlement lands as the same are defined in 31 USC 1606.

VI.

That SDCL 5-11-6 requires the Lawrence County Auditor to distribute all Federal and State payments which are in lieu of tax proceeds in the same manner as taxes are distributed.

VII.

That Public Law 94-565 authorizes said payments to Lawrence County, South Dakota for use by such unit of government for any governmental purpose.

VIII.

That Congress in the creation of Public Law 94-565 specifically defined a unit of local government, as referred to in 31 USC 1601 to refer to a county form of government in the State of South Dakota.

IX.

That Congress in the enactment of Public Law 94-565 specifically authorized the Secretary of the Interior to promulgate regulations to carry into full force and effect the purposes and provisions of Public Law 94-565.

X.

That the Secretary of the Interior promulgated 43 CFR 1881.0-5(b)(2) which specifically excludes school districts from a unit of general government authorized to receive payments in lieu of taxes.

XI.

That since the enactment of Public Law 94-565, and at this time, Lawrence County has in its possession in excess of Four Hundred Thousand Dollars ($400,000.00) received from the United States Government as payments in lieu of taxes which have not been distributed to school districts pursuant to the provisions [of] SDCL 5-11-6.

XII.

That Defendant Lawrence County and Lawrence County Commissioners believe Public Law 94-565 to be directly in conflict with the provisions of SDCL 5-11-6 wherein Defendants Lawrence County believe they cannot abide by the provisions of said State statute.

XIII.

That Article VI. Clause II. of the United States Constitution and applicable section of the South Dakota State Constitution specifically states that Federal Statutes are supreme over State legislation.

XIV.

That it is impossible for Defendants to abide by the provisions of SDCL 5-11-6 and Public Law 94-565.

XV.

That for Defendants to abide by the provisions of SDCL 5-11-6 would destroy the purposes and intents clearly established by Congress in the creation of Public Law 94-565 as is evidenced by the complete Congressional Record and history of Public Law 94-565.

XVI.

That said State Statute is unconstitutional in that it directly is in conflict, frustrates, and makes it impossible for Lawrence County to abide by both the Federal and State legislation.

XVII.

That the Spearfish School District 40-2 will be a recipient of monies disbursed by the County if the provisions of SDCL 5-11-6 are to be followed.

XVIII.

That if Lawrence County is required to abide by the provisions of SDCL 5-11-6, that Lawrence County will be required to disburse some of the monies received by Lawrence County, under the formula prescribed in said Federal Public Act, to Meade School District 46-1 in Sturgis, South Dakota.

XIX.

That if Lawrence County is required under SDCL 5-11-6 to distribute some of the money received under Public Law No. 94-565 out of Lawrence County, that said distribution would be prejudicial to Lawrence County and the taxpayers and citizens of Lawrence County in that it would be a reduction of moneys available in Lawrence County for use in lieu of taxes.

Wherefore, Lawrence County and Lawrence County Commissioners and Lawrence County Auditor respectfully request this Court to declare the rights and remedies of the parties and to specifically declare SDCL 5-11-6 to be in direct conflict and controvention with Public Law 94-565 and therefore unconstitutional and of no force and effect.

Dated this 6th day of April, 1982.

/s/Craig D. Grotenhouse
CRAIG D. GROTENHOUSE
Lawrence County State's Attorney

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(TITLE OMITTED IN PRINTING)

REPLY TO DEFENDANTS' AMENDED COUNTERCLAIM

Plaintiff pleads:

I.

Plaintiff admits the following Paragraphs in Defendants' Amended Counterclaim: Paragraphs I, II, III, IV, V, VI, VIII, X, and XI.

II.

Plaintiff denies each and every matter, allegation and thing contained in Defendants' Amended Counterclaim except as hereinbefore specifically admitted.

WHEREFORE, Plaintiff demands that Defendants' Counterclaim be dismissed and that the Plaintiff take Judgment on its Complaint and for the Plaintiff to receive its costs and disbursements herein.

Dated this 13th day of April, 1982.

/s/A. P. Fuller
A. P. FULLER
AMUNDSON & FULLER
Attorney for Plaintiff

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

(TITLE OMITTED IN PRINTING)

STIPULATION OF FACT

Parties hereto stipulate the following:

I.

Lawrence County is a recipient county for the receipt of monies under Public Law 94-565 (31 USC Sec. 1601-1607).

II.

Lawrence County received during the calendar year 1979 the sum of $134,627.00 under Public Law 94-565. Lawrence County received during calendar year 1980 the sum of $110,370.00 under Public Law 94-565. Lawrence County received further payment in 1981 the sum of which is not known, under Public Law 94-565.

III.

Lawrence County has retained all of said sums of money and has not distributed any monies paid under Public Law 94-565 to the above named Plaintiff under SDCL 5-11-6.

IV.

Public Law 94-565 (31 USC Sec. 1601-1607) was duly passed by the United States Congress October 10, 1976.

V.

SDCL 5-11-6, as amended, was duly passed by the South Dakota Legislature and was effective July 1, 1979.

VI.

That SDCL mandates that a portion of revenues received by Lawrence County be disbursed by said County

into Meade School District 46-1 in Meade County, South Dakota.

Dated this 17th day of August, 1982.

/s/Craig D. Grotenhouse
CRAIG D. GROTENHOUSE
Attorney for Defendant

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/s/A. P. Fuller
A. P. 'PETE' FULLER
Attorney for Plaintiff

Amundson & Fuller
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(TITLE OMITTED IN PRINTING)

NOTICE OF APPEAL

TO: LAWRENCE COUNTY, and the LAWRENCE COUNTY COMMISSIONERS, and their attorney, CRAIG D. GROTENHOUSE

Please take notice that the Plaintiff shall appeal the Judgment entered by the Court on the 1st day of October, 1982 in the above captioned matter.

Dated this 18th day of October, 1982.

AMUNDSON & FULLER

/s/A. P. Fuller
A. P. FULLER
Attorney for Plaintiff

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

FILED
JUN 11 1984
ALEXANDER L. STEVAS
CLERK

No. 83-240 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,

Appellants,

v.

LEAD-DEADWOOD SCHOOL DISTRICT No. 40-1,

Appellee.

On Appeal From The Supreme Court Of The State Of South Dakota

BRIEF FOR APPELLANTS

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June 11, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

58 pp

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QUESTIONS PRESENTED

1. Whether the Supremacy Clause of the United States Constitution voids South Dakota Codified Laws § 5-11-6 for being inconsistent with and altering the scheme of distribution of federal payments to units of local governments mandated by the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 6901-6907.

2. Whether the Supreme Court of South Dakota committed error in failing to properly analyze congressional purpose and intent and in excluding reference to legislative history when it upheld the South Dakota statute challenged as unconstitutional under the Supremacy Clause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-240

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,
Appellants,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,
Appellee.

On Appeal From The Supreme Court Of The State Of South Dakota

BRIEF FOR APPELLANTS

Lawrence County and the Lawrence County Commissioners appeal to this Court and respectfully pray the Court reverse the decision of the Supreme Court of the State of South Dakota and reinstate the findings, conclusions and judgment of the trial court.[1]

OPINIONS BELOW

The findings of fact, conclusions of law and judgment entered by the trial court dismissing Lead-Deadwood School District's complaint for *writ of mandamus* and granting Lawrence County relief on its counterclaim,

[1] The listing of the parties to the proceedings below is set forth in Appellants' Jurisdictional Statement at i.

declaring South Dakota Codified Laws § 5-11-6 (Rev. 1980) unconstitutional for being in conflict with the Payments In Lieu Of Taxes Act, 31 U.S.C. §§ 6901-6907 (formerly §§ 1601-07) is not reported. The findings, conclusions and judgment appear in the Appendix to Appellants' Jurisdictional Statement ("J.S.App.") at 8a.

The majority opinion of the South Dakota Supreme Court reversing the trial court is reported at ____ S.D. ____, 334 N.W.2d 24 (1983) and appears in J.S.App. at 1a. The dissenting opinion appears in J.S.App. at 5a.

JURISDICTION

Appellants Lawrence County and the Lawrence County Commissioners appeal from a decision of the South Dakota Supreme Court in an action commenced by the Lead-Deadwood School District for *writ of mandamus*. The trial court denied Lead-Deadwood School District's prayer for *mandamus* and found for Lawrence County and the Lawrence County Commissioners on their counterclaim declaring, *inter alia*, that the South Dakota statute at issue was void under the Supremacy Clause of the United States and South Dakota constitutions for conflicting with federal law. On appeal the South Dakota Supreme Court reversed and ordered that a *writ of mandamus* issue, holding that the South Dakota statute at issue was not in conflict with federal law and therefore not void under the Supremacy Clause.

The decision of the South Dakota Supreme Court was entered on May 18, 1983 and is final. There were no petitions or orders regarding rehearing. Lawrence County and the Lawrence County Commissioners filed their Notice of Appeal on July 22, 1983, asserting 28 U.S.C. § 1257(2) as the grounds for appellate jurisdiction in this Court on account of the South Dakota Supreme Court's decision sustaining the validity of the South Dakota statute challenged on federal constitutional grounds. J.S.App. at 13a. *See Southland Corp.* v. *Keating*, ____ U.S. ____, 104 S.Ct. 852, 856 (1984); *Xerox Corporation* v. *County of Harris*, ____ U.S. ____, 103 S.Ct. 523, 525-26 (1982); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975).

On August 15, 1983, Appellants filed their Jurisdictional Statement in this Court. After the Court ordered and considered a response from the Appellee[2] and a brief from the United States as *amicus curiae*,[3] the Court noted probable jurisdiction on March 26, 1984.[4]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

---

[2] Appellee filed its Motion to Affirm or in the Alternative to Dismiss the Appeal on November 8, 1983.

[3] The Solicitor General's office filed its brief on February 8, 1984, endorsing Appellants' position, urging the Court to note probable jurisdiction and suggesting that the Court consider summary reversal.

[4] The Solicitor General is also filing a brief at this stage, on behalf of the United States. In addition, the National Association of Counties ("NACo") and other individual counties, are filing a brief as *amici curiae* in support of Appellants.

Section One of the Payments In Lieu Of Taxes Act,[5] 31 U.S.C. § 6902(a), provides:[6]

> The Secretary of the Interior shall make payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose.
>
> * * *

Section Six of the Payments In Lieu Of Taxes Act, 31 U.S.C. § 6901(2), provides, in pertinent part:[7]

> In this chapter,—
>
> * * *

[5] Selected excerpts of the committee reports and congressional debates with regard to the consideration and passage of the Payments In Lieu Of Taxes Act appear in J.S.App. at 14a-31a.

[6] This is a recodification of 31 U.S.C. § 1601. The entire Payments in Lieu of Taxes Act, 31 U.S.C. §§ 1601-07, was recodified in 31 U.S.C. §§ 6901-06 without substantive change by Pub.L. 97-258, 96 Stat. 877 (Sept. 13, 1982). *See* H.R.Rep. No. 651, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S.Code Cong. & Ad. News 1895. References throughout this brief will be to the recodification.

An amendment adding a new section, 31 U.S.C. § 6907 amending the definition of "units of general local government" in § 6901 and repealing § 6903(a)(4), became effective July 30, 1983. Pub.L. 98-63, 97 Stat. 324. This amendment was in response to a decision from the U.S. Court of Appeals for the Sixth Circuit. *See infra* note 21. *See also* J.S.App. at 32a-37a for text of the amendment and portions of the Conference Committee Report and congressional debate concerning this amendment.

[7] This section is a recodification and amendment of 31 U.S.C. § 1606. *See supra* note 6 and Appellants' Jurisdictional Statement ("Juris.St.") at 4. The amendment to this section, as set forth in Pub.L. 98-63, further defined units of general government to include those that provide "general" governmental services. *See infra* note 22.

> (2) "unit of general local government" means:
>
> (A) a county (or parish), township, borough existing in Alaska on October 20, 1976, or city where the city is independent of any other unit of general local government, that: (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used in January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term "governmental services" includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation, and governmental administration . . .
>
> * * *

43 C.F.R § 1881.0-5 provides, in pertinent part:

> (b)(1) "Unit of general local government" means a unit of that type of government which, within its state, is the principal provider of govermental services affecting the use of entitlement lands. Those services of government include (but are not limited to) maintenance of land records, police protection, fire protection, taxation, land use planning, search and rescue and road construction. Ordinarily, a unit of general local government will be a county . . .[8]
>
> * * *
>
> (b)(2) The term "unit of general government" excludes single purpose or special purpose units of local government such as school districts or water districts.

[8] Section 1881.0-5(b)(1) was amended September, 1983 to add the word "local" after the word "general", to conform to Congress' 1983 amendment. 48 Fed.Reg. 42817 (Sept. 20, 1983). *See infra* note 21.

43 C.F.R. § 1881.2 provides, in pertinent part:

> The monies paid to entitled units of local government may be used for any governmental purpose except as noted [for Section Three payments].
>
> * * *

Section Three of the Payments In Lieu Of Taxes Act, 31 U.S.C. § 6904, provides, in pertinent part:[9]

> (a) In addition to payments the Secretary of the Interior makes under section 6902 of this title, the Secretary shall make a payment for each fiscal year to a unit of general local government collecting and distributing real property taxes (including a unit in Alaska outside the boundaries of an organized borough) in which is located an interest in land that—
>
> (1) The United States Government acquires for—
>
> (A) the National Park System; or
>
> (B) the National Forest Wilderness Areas; and
>
> (2) was subject to local real property taxes within the 5-year period before the interest is acquired.
>
> (b) The Secretary shall make payments only for the 5 fiscal years after the fiscal year in which the interest in land is acquired. Under guidelines the Secretary prescribes, the unit of general local government receiving the payment from the Secretary shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest. A unit receiving a distribution may use a payment for any governmental purpose . . .
>
> * * *

[9] This section is a recodification of 31 U.S.C. § 1603. *See supra* note 6.

> (d) The Secretary may prescribe regulations under which payments may be made to units of general local government when subsections (a) and (b) of this section will not carry out the purpose of subsections (a) and (b).
>
> * * *

South Dakota Codified Laws § 5-11-6 (1981) provides:

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

STATEMENT OF THE CASE

On February 15, 1982, Lead-Deadwood School District No. 40-1 (the "School District") filed its complaint for *writ of mandamus* in the Circuit Court for the Eighth Judicial Circuit of South Dakota. Joint Appendix ("J.A.") at 1a. The School District sought to have Lawrence County and the Lawrence County Commissioners (collectively the "County") ordered to distribute to the School District funds received by the County from the United States government under Section One of the Payments in Lieu of Taxes Act, 31 U.S.C. §§ 6901-07 (1983 and Supp. 1984) (the "Act"). *Id.* Section One of the Act, 31 U.S.C. § 6902(a), provides for payments to counties and other units of local government that have certain federal tax-exempt lands within their boundaries to reimburse those units of local government for lost tax revenues and the costs of providing services for those federal lands. Payments under Section One of the Act may be used by the recipient unit of local government "for any governmental purpose." 31 U.S.C. § 6902(a); 43 C.F.R. § 1881.2. The County had received payments under the Act from the federal government, but had not distributed any to the School District. J.A. at 2a, 10a.

The alleged authority for *mandamus* and the requested distribution to the School District was South Dakota Codified Laws ("S.D.C.L.") § 5-11-6, which directed that all federal payments in lieu of taxes, *i.e.*, all payments under the Act, be distributed in the same manner as state taxes. The school districts in Lawrence County, including Lead-Deadwood School District, had received sixty percent of the County's regular tax proceeds and therefore were entitled to sixty percent of the County's Section One payments pursuant to S.D.C.L. § 5-11-6. J.S.App. at 2a and 10a.

The County answered the complaint and counterclaimed for a declaration that S.D.C.L. § 5-11-6 was in direct conflict with the terms and purposes of the Act so as to be declared void under the Supremacy Clause of the United States and South Dakota Constitutions. J.A. at 4a.[10] Because Section One of the Act provides that the payments to the units of local government may be used for *any* governmental purpose, the County argued that, consistent with congressional purpose and the terms of the Act itself, Congress granted the County, as a unit of local government, absolute discretion in determining how to expend the payments it received under Section One of the Act as compensation for the tax immunity of federal lands within its boundaries. *See* J.A. at 5a. The County also argued that the State of South Dakota could not direct any portion of the County's Section One funds to school districts nor any other entity in South Dakota,

[10] The County also sought dismissal of the Complaint for failure of the Plaintiff to join the County's auditor as a Defendant. J.A at 4a. It appears that the action against the County and the County Commissioners is improper in that a *writ of mandamus* would only issue as to the county auditor. *See* Rapid City Area School District No. 51-4 v. Pennington County Auditor, ___ S.D. ___, 284 N.W.2d 308, 312 (1979).

which were not units of local or general government as defined in the Act and regulations promulgated thereunder, and that the state could not impose any conditions on the County's determination of the appropriate governmental purposes to be served by the payments. *See* J.A. at 6a-8a.

The matter was submitted to the trial court on a stipulation of facts. J.A. at 10a. On September 27, 1982, the trial court entered judgment for the County and against the School District, finding that S.D.C.L. § 5-11-6 stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Act and as such was unconstitutional and void under the Supremacy Clause of both the United States and South Dakota Constitutions. J.S.App. at 10a. The trial court also held that the County was permitted to use all the payments received from the federal government under Section One of the Act for any lawful purpose without regard to S.D.C.L. § 5-11-6. J.S.App. at 11a.[11]

On October 18, 1982, the School District appealed the trial court's judgment to the South Dakota Supreme Court. J.A. at 12a. On May 18, 1983, the South Dakota Supreme Court reversed the trial court and remanded the matter, directing that a *writ of mandamus* issue ordering the County to pay over the federal payments received by the County under the Act to the School District in accordance with S.D.C.L. § 5-11-6. J.S. App. at 4a. Although the South Dakota Supreme Court did not examine the Act's legislative history or the Act as a whole, the court found that S.D.C.L. § 5-11-6 was in harmony with the Act and therefore not an obstacle to the

[11] There was no issue presented as to South Dakota's power to control the expenditure of any payments in lieu of *state* taxes made by the *state* government to the County.

fulfillment of the Act's purposes. *Id.* Two justices of the South Dakota Supreme Court dissented, reasoning that S.D.C.L. § 5-11-6 undermined the accomplishment and execution of the full purposes and objectives of Congress by earmarking funds for school districts contrary to the terms of the Act, the congressional grant of discretion to the County, and the Act's legislative history. *Id.* at 5a. The dissent concluded that the trial court's decision should have been affirmed. *Id.* at 7a. This appeal followed.[12]

The constitutionality of S.D.C.L. § 5-11-6 was initially challenged by the County in the United States District Court for the District of South Dakota well before the School District filed its complaint in state court. In *Lawrence County* v. *State of South Dakota*, 513 F.Supp. 1040, (D.S.D. 1981), *vacated on other grounds*, 668 F.2d 27 (8th Cir. 1982), the district court found that the total discretion given counties under Section One of the Act was abridged by S.D.C.L. § 5-11-6 and the Court declared the state statute void under the Supremacy Clause. *Id.*, 513 F.Supp. at 1043. The United States Court of Appeals for the Eighth Circuit vacated the decision on jurisdictional grounds. *Id.*, 668 F.2d at 28, 31.[13] The School District's

[12] As of this date, the *writ of mandamus* has not issued.

[13] The court of appeals held that the district court was without jurisdiction to render the declaratory relief because the constitutional challenge to the state statute was only defensively raising a federal question and was therefore not within the court's federal question jurisdiction. *Id. See* Public Service Commission v. Wycoff Co., 344 U.S. 237, 248-49. *But see* Shaw v. Delta Airlines, Inc., ___ U.S. ___, 103 S.Ct. 2890, 2899, n.14 (1983) (federal question jurisdiction exists where suit seeks injunctive relief from state regulation allegedly preempted by federal law under the Supremacy Clause).

The Eighth Circuit's decision did not, however, affect the substance of Appellants' claim. The district court's opinion remains persuasive and another district court followed it in finding that an Arkansas statute, similar to S.D.C.L. § 5-11-6 in apportioning payments under the Act, improperly conflicted with the Act. Altus-Denning School District No. 30 v. Franklin County, 568 F.Supp. 95, 102 (W.D.Ark. 1983). *See infra* p. 19.

mandamus action was filed in state court three weeks after the Eighth Circuit's decision.[14]

SUMMARY OF ARGUMENT

The Payments in Lieu of Taxes Act provides a comprehensive scheme for minimum payments by the federal government to counties and other units of local government to compensate them for the tax immunity of federal lands within their boundaries. As evidenced in the Act itself and in the legislative history, the payments under Section One of the Act were intended by Congress to be used by the local governments for any governmental purpose because these local governments were deprived of tax revenues and at the same time were required to provide a variety of services for the maintenance of federal lands. Due to the diversity of lands encompassed by the Act and the recognition that costs of maintaining the lands varied greatly, restrictions on the use of these funds were deemed improper.

These payments are supplemented by additional payments to units of local government under Section Three of the Act, for lost revenues due to federal acquisitions of

[14] The Attorney General for the State of South Dakota defended the County's action in federal court, but, despite being served with notice in the state court action, J.S.App. at 9a, as well as the notice of appeal and Jurisdictional Statement here as required by the Court's rules, has not yet appeared in this litigation to defend the constitutionality of the South Dakota statute. In 1980, the South Dakota Attorney General did issue an opinion finding that S.D.C.L. § 5-11-6 was not in conflict with the Act nor preempted under the Supremacy Clause. *See* Opinion No. 80-12.

park and wilderness lands which were taken off the tax rolls after 1969. These additional payments are distributed to units of local government but must be redistributed proportionately to affected school districts under regulations issued by the Department of the Interior.

The South Dakota law at issue would require that *all* federal payments under the Act, including Section One payments, be distributed in the same manner as regular tax proceeds and not, as the Act directs, to the units of local government to be spent in their discretion. This scheme not only conflicts directly with the Act, but frustrates both the express and implied purposes of the Act by substituting the state's judgment for that of Congress. Congress recognized that the special costs to units of local government of providing services for federal lands are unique and that other statutes which provide payments for federal lands directly to the state governments oftentimes did not result in any compensation going to the counties or were restricted to use for roads or schools and did not compensate the local governments for the special costs of maintaining federal lands. Congress therefore determined that payments under the Act should go *directly* to the units of local government and not be earmarked for any special purpose so that the local governments would have absolute discretion in determining where to spend the funds. Further, because Congress expressly included school districts in Section Three of the Act but excluded them from Section One, it follows that school districts cannot receive Section One payments directly, but only those which the County independently determines to provide.

The South Dakota statute, therefore, runs afoul of the Supremacy Clause for two reasons. First, the state stat-

ute conflicts with the terms of the Act and frustrates the basic purpose and objectives of the Act. The Act's primary and overriding purpose is to reimburse units of *local* government both for the loss of their tax revenues and the special costs of providing services for these tax-exempt lands. The legislative history of the Act leaves no doubt—largely because of the inequities of distributions from state governments under other statutes—that Congress vested absolute discretion in the units of local government to determine which of their governmental purposes would be most appropriately served by the expenditure of their Section One receipts due to the unique costs of services required by the presence of federal lands within their boundaries.

Second, the federal government's authority to regulate public lands is absolute and any federal statute or regulation dealing with public lands preempts state legislation on the subject.

Finally, the recent amendment adding 31 U.S.C. § 6907 grants limited authority to state governments to redistribute Section One payments among smaller units of local government in proportion to the amount of tax-exempt lands within their respective boundaries. The fact that Congress chose to amend the Act to give the states this limited authority demonstrates that no such authority existed prior to the amendment. The amendment does not retroactively authorize the South Dakota statute and, in any event, the South Dakota statute goes beyond any such authority as it requires a redistribution of payments to entities other than units of local government and not in proportion to the amounts of federal lands within the units' boundaries.

ARGUMENT

I. The Payments In Lieu Of Taxes Act Provides A Comprehensive Payment Scheme Of Reimbursement To Units Of Local Government For The Costs Of Maintaining Tax-Exempt Federal Lands Within Their Boundaries

The presence of tax-exempt federal lands within the boundaries of state and local governments has generated considerable legislation by Congress designed to compensate for the loss of tax base and reimburse local governments for the costs of providing and maintaining services for the federal lands. Many of the statutes give to state and local governments a share of revenues derived from oil and gas leasing, mining, grazing and other income producing activities on the lands. *See, e.g.*, 31 U.S.C. § 6903(a)(1)(A)-(J). In addition to these revenue-sharing statutes, and in response to many of the inequities under these statutes, Congress passed the Payments In Lieu of Taxes Act ("the Act"), 31 U.S.C. §§ 6901-07,[15] which provides for payments by the federal government directly to units of *local* governments, as opposed to state governments, to compensate them for the costs of maintaining public lands, most of which were not directly producing any revenues. S.Rep. No. 1262, 94th Cong. 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5968 ("S.Rep. No. 1262"); H.R.Rep. No. 1106, 94th Cong. 2d Sess., 4-5 (1976) ("H.R.Rep. No. 1106").[16]

These federal lands, known as "entitlement lands" under the Act, were determined by Congress to have adversely affected the tax base of the various local governments where the lands are located due to the absence of income producing activities which would allow

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[15] *See supra* note 6.

[16] Selected excerpts of these reports appear in the Appendix to Appellants' Jurisdictional Statement at 14a-23a.

funds to accrue to the local governments as well as the inequitable distributions of funds under already existing revenue sharing statutes.[17] *See* S.Rep. No. 1262 at 7-10, J.S.App. at 15a-17a. The recommendation of the Public Land Law Review Commission, which had been established to report on these inequities and formulate a new policy for reimbursing local governments, was that certain federal lands must be preserved so that they may be used and enjoyed by all Americans and that the United States was obligated to spread the burden of this policy among the public at large so it would not be borne solely by those localities where the federal lands are located.[18] The Act translated this basic principle into law by "recogniz[ing] the burden imposed by the tax immunity of Federal lands [and] providing minimum federal payments to units of local government within the boundaries of which these lands lie." S.Rep. No. 1262 at 6.[19] One of

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[17] Entitlement lands include those lands that are: (1) in the national park or national forest systems; (2) administered by the Bureau of Land Management; (3) dedicated to federal water resource projects; (4) used by the Army for mobilization and reserve training; (5) dredge disposal areas; (6) in the vicinity of Purgatory River and Pinyon Canyons, Colorado; or (7) are special Interior reserve lands. 31 U.S.C. § 6901(1)(A)-(G). Lands excluded from the definition, and for which no payments are made under the Act, include some 60 million acres administered by the Departments of Defense, Transportation and other agencies. S.Rep. No. 1262 at 14, n.15; 31 U.S.C. § 6902(c).

[18] Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress by the Public Land Law Review Commission* (Washington, D.C. 1970), at 236 *quoted in* S.Rep. No. 1262 at 6.

[19] Approximately seventeen hundred counties in forty-nine states (and the District of Columbia) have 450 million acres of federally owned and tax-exempt lands within their boundaries for which they receive payments approaching $100 million annually under the Act. U.S. Department of Interior, Bureau of Land Management, *Payments In Lieu Of Taxes, Fiscal Year 1983*; Appendix D to Brief of *amici curiae* NACo, *et al.*

Congress' overriding concerns was to provide compensation to the local governments for their providing a variety of services, including police, fire and other protection for maintaining the federal lands. *See infra* Part IB; J.S.App. at 16a. These costs varied by location as well as by type of entitlement lands. *Id.* Accordingly, payments were to be made directly to units of general local government to be used by them for *any* governmental purpose under Section One of the Act.[20]

Congress also sought to define which governmental entities would receive the payments. In the most recent codification of the Act, a "unit of general local government" is defined to include counties, parishes, townships, municipalities, boroughs, or other units of government below the state which is a unit of general government and principal provider of governmental services—*e.g.*, public safety, environment, housing and social services—as determined by the Secretary of the Interior. 31 U.S.C. § 6901(2). When Interior promulgated its implementing regulations, it provided that to receive Section One funds, the units must be the principal provider of governmental services which affect the use of the entitlement lands. 43 C.F.R. § 1881.0-5(b)(1). Ordinarily these units

[20] Payments under Section One of the Act to a unit of general local government is based on the total acreage of entitlement lands within its boundaries limited by a *per capita* population factor. 31 U.S.C. § 6903. The County received approximately $400,000 in payments under the Act for 1979-1981. J.A. At 6a; J.S. App. at 1a, 9a. In 1982, the County received an estimated $116,214 and in 1983 an estimated $142,127. *Payments in Lieu of Taxes, Fiscal Year 1982*, Schedule 2, p. 58; *Fiscal Year 1983*, Schedule 2, p. 57. The County received no Section Three payments for the years 1982 and 1983 and only one county in South Dakota, Pennington County, received payments under Section Three in 1982.

would be counties. *Id.*[21] Special purpose units such as school and water districts were *not* units of general government and are ineligible to receive Section One payments directly. *Id.* § 1881.0-5(b)(2). This determination was affirmed in the Act's recent amendment to 31 U.S.C. § 6901(2),[22] as well as in the legislative history. "The definition of 'unit of local government' assures that counties, cities, towns and townships . . . and other units of local government that have general governmental responsibilities, *as opposed to single purpose functions such as school districts* and water districts, will be the recipients of these payments." H.R.Rep. No. 1106 at 12, J.S. App. at 23a (emphasis supplied).[23] Indeed, the

[21] The Secretary also found that in some cases towns or townships would be the appropriate recipients. 43 C.F.R. § 1881.0-5. However, when the Secretary determined that townships in Michigan could not receive Section One payments, six townships there challenged the regulation and were determined to be proper recipients of Section One payments. Mead Township v. Andrus, 695 F.2d 1006 (6th Cir. 1982). In response to that decision, Congress amended the Act and states are now allowed the limited authority to redistribute payments under the Act to smaller units of general government, such as townships, that have entitlement lands within their boundaries. 31 U.S.C. § 6907. But, as Congress found and the district court in Arkansas agreed, the Secretary of the Interior's method of defining units of local government was proper—the units must provide *general* governmental services. *See* Altus-Denning School District No. 30-1, 568 F.Supp. at 101; 48 Fed.Reg. 42817 (Sept. 20, 1983).

[22] The Act's original definition of units of local government in 31 U.S.C. 1606(c), and as recodified in 1982 at § 6901(2), referred only to units of general government and did not contain the "principal provider of governmental services" language or list the types of services in the definition. Juris.St. at 4. These provisions were added by amendment in 1983 when congress also added a new section, § 6907, partially in response to the decision in Mead Township v. Andrus. *See supra* note 21.

[23] Congress had already provided for special funds to be paid to school districts on account of the added costs of educating federal employees living on tax exempt federal lands. *See* 20 U.S.C. § 236.

legislative history of the Act leaves no doubt that the units of local government were to have absolute discretion in determining how and where to expend Section One funds—in large part due to the inequities of distributions under other statutes directly to *state* governments. *See infra* Part IIA(i).

S.D.C.L. 5-11-6, changes the federal scheme by limiting the County's discretion. That statute requires the County to distribute the in-lieu payments as it distributes regular tax proceeds. *See supra* p. 7. This scheme of distribution would result in the direct payment to the School District and other school districts within Lawrence County of sixty percent of the County's Section One payments from the federal government. J.S.App. at 10a.[24] This restriction on the County's discretion and redirection of the funds contradicts the plain and express language of the Act, frustrates Congress' most basic purpose and objectives underlying the Act and is inconsistent with other legislation already in place to assist impacted school districts.

A. The Plain Meaning Of The Act Requires That Units Of General Local Government Independently Determine The Manner Of Expending Section One Funds

The starting point for statutory analysis necessarily begins with the words of the statute itself. *Dickerson* v. *New Banner Institute, Inc.*, ___ U.S. ___, 103 S.Ct. 986 (1983). The operative language which controls the disbursement of Section One funds is as follows: "A unit [of general local government] may use the payment for any governmental purpose." 31 U.S.C. § 6902(a); *see also*

[24] If the other special districts in Lawrence County that receive tax proceeds from the County joined in the School District's action, the County would have *no* discretion in determining how to expend its Section One payments; all of them would be spoken for. *See infra* p. 38.

43 C.F.R. § 1881.2. Congress' choice of the word "may" implies that some degree of discretion was given to the unit. *United States* v. *Rodgers*, ___ U.S. ___, 103 S.Ct. 2132, 2149 (1983). Further, the word "any" is defined as "some; *one out of many;* an indefinite number . . . ". Black's Law Dictionary, 86 (5th ed., 1979) (emphasis supplied). Thus, under the statutory language of Section One itself, discretion and choice are conferred upon and reserved to the unit of local government. It alone has the discretion to choose *which* particular governmental purpose is appropriate.[25] It is plain, then, from this language that an attempt by South Dakota to restrict the discretion, or pre-determine the local units' "governmental purposes" is inconsistent with the words "may" and "any" as well as with the nature of the grant—the funds are paid directly to the *local* governments, not the state governments. The state of South Dakota simply cannot tell the local unit how to expend its funds without undoing the federal scheme.

In *Altus-Denning School District No. 31* v. *Franklin County*, 568 F.Supp. 95 (W.D.Ark. 1983), the court found that an Arkansas statute which similarly redirected Section One funds would be unconstitutional. The Arkansas statute provided that those Arkansas counties which receive funds from the federal government "for the support

[25] In the Act, Congress did not define the possible governmental *purposes* to be served by the payments. The courts have held that payments to school districts would constitute one of many proper governmental purposes. Kendall v. Towns County, 146 Ga.App. 760, 247 S.E.2d 577 (1978); Lawrence County v. State of South Dakota, 513 F.Supp. at 1042. Congress subsequently defined units of local government by types of governmental services provided, including services related to "public safety, environment, housing, social services, transportation and governmental administration." 31 U.S.C. § 6901(2)(A) (Supp. 1984). Presumably, expenditures for these services would also qualify as uses for governmental purposes.

of public schools" on account of national forest lands must distribute those funds to school districts. Ark. Stat. Ann. § 80-726. National forest lands are entitlement lands under the Act and that acreage is counted in computing a county's Section One payments. 31 U.S.C. § 6901(1). The court found that Interior's regulation properly excluded school districts from its definition of "units of local government" and, in any event, that Arkansas could not direct Section One funds to school districts by statute. (568 F.Supp. at 102, emphasis in original):

> Thus, even though Congress no doubt intended for some of the in lieu of tax funds to go to school districts, believing that the counties would disburse these funds with prudence, equity, and an eye to the obvious needs of the school districts, Congress nonetheless expressly allowed whichever unit constitutes the "unit of local government" of 31 U.S.C. § 1606(c) to expend these funds for *any* governmental purpose.

Here, S.D.C.L. § 5-11-6 requires the County expend its Section One payments precisely like regular tax proceeds. By replacing "any" with a specific governmental purpose, S.D.C.L. § 5-11-6 conflicts with the plain meaning of the language of the Act.[26] Indeed, it would result in the County having no discretion to distribute the Section One payments as all tax proceeds are distributed in proportion to the budgets submitted to the County by its various subdivisions, including the School District. *See infra* p. 38.

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[26] The South Dakota Supreme Court found to the contrary, limiting their focus to the fact that expenditures on schools is *a* governmental purpose and therefore consistent with the word *any*. J.S.App at 3a-4a. This simplistic analysis ignores that the choice and determination of governmental purpose is conferred upon the *county* and not the *state*. *See infra* Part IIB.

B. The Legislative History Of The Act Demonstrates That The Units Of Local Government Have Absolute Discretion In Expending Section One Payments

The legislative history of the Act and statements of the Act's supporters and sponsors emphasize that Congress was designating Section One payments to be used by local governments in *their* discretion. This would achieve the purpose of providing reimbursement directly to the local governments closest to and impacted most directly by the presence of federal tax-exempt lands. (H.R.Rep. No. 1106 at 12, J.S.App. 22a).[27]

> . . . [T]he Committee believes that *payments under H.R. 9719 should go directly to units of local government since it is the local governments that assume the burden for the tax immunity of these lands.* The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose. (Emphasis supplied).

State income and sales taxes as well as other revenue sharing statutes, which allow some revenues generated on federal lands to go to the states, were deemed inadequate to compensate the local units of government because the control which states exert under those revenue sharing acts often resulted in counties receiving little or no compensation. (S.Rep. No. 1262 at 9; J.S.App. at 16a).

> Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level

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[27] *See generally* Brief of *Amici Curiae* NACo, *et al.*, for a description of the political realities and need to compensate directly the local units of government closest to the lands for the costs and burdens of supporting the federal lands within their boundaries.

> and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt.

Thousands of visitors come each year to some federal lands, yet the income and intangible economic benefits to the local economy "do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands." S.Rep. No. 1262 at 9; J.S. App. at 16a. Congress therefore made clear its intention to provide payments under Section One of the Act to be used by the counties for their particular needs as they saw fit without state interference.[28]

The South Dakota statute attempts to do precisely what Congress determined should not be done even by the federal government *itself*—earmark Section One payments.[29] The ultimate result would be, of course, to eliminate *all* discretion because all of the County's regular tax proceeds are distributed according to a pre-

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[28] That Congress expressly found a "basic distrust" of the states is important. Not only did Congress determine that no restrictions could be imposed by Congress *itself*, *see*, *e.g.*, statutes listed in 31 U.S.C. § 6903, it implied that no restrictions could be imposed by state governments. Accordingly, the states have no authority, express *or* implied to involve themselves in the Act's program. *Cf.* Rogers v. Brockette, 588 F.2d 1057, 1072 (5th Cir.) *cert. denied* 444 U.S. 827 (1979).

[29] "Since under the law as written it is provided that funds may be allocated for any governmental purpose, the Secretary recognized that 'limitations cannot be placed upon the use of these funds by regulations.'" Kendall v. Towns County, 247 S.E.2d at 579.

designated plan based on budgets and levies. This is simply not how Congress intended the Act's payments to be distributed.

Congress' decision to treat federal payments under Section One of the Act differently from tax proceeds is not only a statement of congressional preference expressed in the Act and its legislative history, but quite logical. In finding that the existing revenue sharing provisions were inadequate, Congress noted the different types of costs incurred in supporting activities on federal as opposed to private lands.

> Even in the few instances when a local government's share of the various revenues and fees is sufficient to meet service demands arising from the Federal lands and to approximate the loss of ad valorem tax revenues which would otherwise be generated by those lands, *too many of the revenue sharing provisions restrict the use of funds to only a few governmental services—most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands.* These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. *It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.*
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> * * *
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> While the Committee does not discount the fact that some benefits accrue to localities where national parks, monuments and wilderness areas are located, the revenues produced for the local community do not match the burdens of providing additional police and fire protection, search and rescue service, medical and hospital facilities, and other governmental

> responsibilities required in and around these areas because of the influx of visitors.

S.Rep. No. 1262 at 9, 13 (emphasis supplied); J.S.App. at 16a, 17a. Congress recognized that the burden of tax exempt property falls directly on the units of local government which must provide police, fire and other services and therefore the Act provides that the counties and *not the states* are to determine how Section One payments are to be distributed. The Act's purpose in making these payments to units of local governments for their discretionary expenditure would be frustrated by South Dakota's attempt to redirect the payments.[30]

C. The Provision Of Special Supplemental Payments To School Districts Under Section Three Of The Act And Other Impact Aid Statutes Demonstrates That Section One Payments Could Not Be *Required* To Go To School Districts

Congress did express special concern for affected school districts and provided for their compensation under a separate section of the Act. As a supplement to payments under Section One of the Act, Section Three of the Act provides for additional payments to units of local government for lands acquired for national park systems or forest wilderness areas after December 31, 1970. 31 U.S.C. § 6904. Unlike Section One payments, which are not earmarked for any special purpose, Section Three

[30] Congress' recent amendment authorizes states to make limited redistributions of payments under the Act among units of local government. 31 U.S.C. § 6907. This limited authority does not now support the complete rewriting of Congress' plan in S.D.C.L. § 5-11-6. *See supra* n.21. Further the limited authority in the amendment supports the conclusion that the states had *no* authority to redistribute the payments at all; otherwise the section would be mere surplusage. United States v. Menasche, 348 U.S. 528, 538-39 (1955); Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978).

payments are to be distributed under guidelines established by the Secretary of the Interior on a proportional basis to counties and affected school districts which have incurred losses of real property taxes as a result of the addition of land to the federal park and wilderness systems. *Id.*

These Section Three payments provide supplemental assistance to the units of local government and school districts for five years after the land's acquisition. These payments are designed to alleviate the *immediate* impact of removing land from the tax rolls. S.Rep. No. 1262 at 18; J.S.App at 18a. *See also* H.R.Rep. No. 1106 at 11; J.S.App. at 21a. This express provision providing compensation for school districts in Section Three supports the conclusion that Congress did not intend any of the Section One payments to go to the school districts except those the county independently decided to provide.[31] This was the conclusion reached on this precise issue in *Altus-Denning School District*, 568 F.Supp. at 101 (emphasis in original):

> The inference that Congress did not intend funds received under [Section One] to be distributed to school districts is supported by the fact that in [Section Three] Congress provided for payments to be made by the Secretary of the Interior to counties for lands acquired within such counties by the government for the Redwood National Park or acquired for the National Park System or National Forest Wilderness areas. The [Section Three] funds are to be distributed on a proportional basis to units of local government and affected school districts. This sug-

[31] Analysis of Section One of the Act necessarily entails construction of the Act as a whole and analysis of the entire Act's nature and purpose. Kokoskza v. Belford, 417 U.S. 642, 650 (1974); Juvenile Products Manufacturers Assoc. v. Edmisten, 568 F.Supp. 714, 718 (E.D.N.C. 1983); A. Sutherland, 2A *Statutes and Statutory Construction*, § 46.05, 56 (4th Ed. 1973).

> gests that Congress, for some inexplicable reason intended to treat [Section One] funds differently from [Section Three] funds.

Accordingly, Congress made a distinction which would be effectively dropped from the Act if Section One payments could be legislatively directed to the school district. *See Aloha Airlines* v. *Director of Taxation*, ____U.S. ____, 104 S.Ct. 291, 294 n.6 (1983) (". . . the statute is quite clear that Congress chose to make the distinction and the courts are obliged to honor this congressional choice.")[32]

Again, this distinction is quite logical. School district budgets generally correspond to population distribution and thus fairly apportion the expense of maintaining public schools to those persons and communities that derive benefits from public education. The majority of the entitlement lands, however, are uninhabited and provide no added costs for the school districts. Where there are tax-exempt federal lands with school children, compensation is provided not only by Section Three, but by the special impact aid provided by 20 U.S.C. § 236. *See Middletown School Committee* v. *Board of Regents*, 439 F.Supp. 1122 (D.R.I. 1977). Thus, Congress, while not barring school districts from Section One allocation, expressly provided for school districts by other relief appropriations. Congress' express designation underscores that *any* governmental purpose indicates a broader choice than just school districts—a choice reserved to

[32] *See also* Persinger v. Islamic Republic of Iran, No. 81-2003 (D.C.Cir., March 13, 1984) Slip Op. at p. 15 ("Where Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.").

local government. The State's redistribution primarily to school districts undermines this congressional intent.[33]

II. S.D.C.L. § 5-11-6 Is Unconstitutional By Supplanting The Federal Scheme For Distribution Of Payments In Lieu Of Taxes

The Supremacy Clause comes into play here not in the usual situation of federal law preempting an already established state scheme of regulation, rather the reverse—state law is interfering with a prior existing federal scheme. Moreover, it is a federal scheme distributing federal funds and, as such, the offending state statute must give way under the Supremacy Clause.

S.D.C.L. § 5-11-6 disrupts the federal scheme for distributing payments under the Act by imposing restrictions on the local government's use of Section One payments. By providing that all federal payments in lieu of taxes to units of local government in South Dakota be distributed in the same manner as normal tax proceeds, the state government has substituted its own scheme for reimbursing local governments burdened with federal tax-exempt lands in their boundaries.

Congress, however, expressly determined that payments were to go to counties and not to state governments, so as to avoid the state governments' control over the distribution of the payments. *See supra* p. 22. An examination of Section Four of the Act, 31 U.S.C. § 1604,

[33] Reallocation of Section One funds to school districts would unfairly shift the burden of public education from private property, generally occupied by the state's citizens, to counties with uninhabited lands. Maintenance of the federal lands ordinarily imposes quite different burdens on local governments than budgeting expenses for schools. Further, it is for the Secretary of Interior, not the state, to set the guidelines for distributing Section Three payments. 31 U.S.C. § 6904. S.D.C.L. § 5-11-6 purports to reallocate these payments as well.

underscores this determination. That section lists ten statutes which provide for revenue sharing payments to be made to state[34] and local governments[35] to return a percentage of the revenues derived by the federal government from the operations on certain federal lands. Those payments are generally earmarked for particular purposes and are subtracted out from any Section One payments to be made to the local governments to avoid double payments. 31 U.S.C. § 6903(b)(1)(A). To cure the inequities of those distributions, Congress provided that payments under Section One of the Act would go *directly* to local governments so that states would not be determining their distribution, nor restricting their use to particular purposes.[36] "These reports and the other evidence cited by this Court clearly establish that Congress intended to provide monies under [31 U.S.C. § 6902] to the counties for them to use for their particular needs." *Lawrence County* v. *State of South Dakota*, 513 F.Supp. at 1042. *Accord, Altus-Denning School District*, 568 F.Supp. at 102. ". . . Congress was directing the states to keep their noses out of the manner in which a

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[34] *See, e.g.*, 16 U.S.C. § 500 (payment of 25% of national forest receipts to states for schools and roads); 30 U.S.C. § 919 (payment of 50% of oil and gas royalties from federal lands to states for expenditures as they direct).

[35] *See, e.g.*, 7 U.S.C. § 1012 (25% of certain farm revenues paid to counties for schools and roads).

[36] The restriction on the use of federal funds in the Section Four statutes was one of the primary reasons for establishing that Section One payments were to be used "for *any* governmental purpose." J.S.App. at 16a-17a. Those statutes should be read *in pari materia* with the Act in determining its construction and meaning. 2A Sands, Sutherland *Statutory Construction* § 51.03 (4th Ed. 1973). The restrictions on the use of funds in those statutes support the conclusion that the "*any* governmental purpose" language in the Act meant that *no* restrictions were to be imposed on the use of Section One payments by *anyone*.

county would distribute these funds." *Lead-Deadwood School District* v. *Lawrence County, et. al.*, ____ S.D. ____, 334 N.W.2d. 24-27 (1983) (Dunn, J. dissenting) (J.S.App. at 6a). The South Dakota statute seeks to substitute the state's judgment for that of Congress in attempting to impose restrictions on the use of Section One payments, which Congress determined should not be imposed, and by directing payments to entities other than units of general local government. The state statute is therefore void under the Supremacy Clause.

A. The Supremacy Clause Voids S.D.C.L. § 5-11-6 For Conflicting With The Act And Frustrating Congressional Purpose And Objectives

There is no question that Congress may, within constitutional limits, preempt state authority to legislate in a particular area in express terms. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Further, Congress may implicitly preempt state regulation where "[t]he 'scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room [for the States] to supplement it', because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' " *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. ____, 103 S.Ct. 1713, 1722 (1983), *citing Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. 141, 152 (1982) and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is no less true where state law interferes or infringes upon federal programs. *United States* v. *Med O Farm, Inc.*, 701 F.2d 88, 90 (9th Cir. 1983).

Where Congress has entirely displaced state regulation, state law is preempted and nullified to the extent it conflicts with federal law. *Pacific Gas & Electric Co.*, ___ U.S. at ___, 103 S.Ct. at 1722.[37] "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility," *Id. citing Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S.132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id., citing Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *Accord, Silkwood* v. *Kerr-McGee Corp.*, ___ U.S. ___, 104 S.Ct. 615, 621 (1984); *Philko Aviation, Inc.* v. *Shacket*, ___ U.S. ___, 103 S.Ct. 2476, 2479 (1983); *Exxon Corp.* v. *Eagerton*, ___ U.S. ___, 103 S.Ct. 2296, 2301 (1983); *Fidelity Federal Savings & Loan*, 458 U.S. at 153; *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). The preemption is all the more apparent where the federal scheme was in place and the state legislation followed as an alteration of the federal program.[38]

A determination of conflict "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict" and "in deciding whether any conflict is present, a court's concern is necessarily

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[37] "Often Congress does not clearly state in its legislation whether it intends to preempt state laws; and in such instances, the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

[38] The fact that the program involves federal entitlements does not, in and of itself, preempt all state regulation. Hisquierdo v. Hisquierdo, 439 U.S. 572, 588 (1979). Rather, traditional Supremacy Clause analysis applies. *Id.*

with the nature of the activities which the states have sought to regulate, rather than on the method of regulation adopted." *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981). Most importantly, the Court must "consider the relationship between [the] state and federal laws as they are interpreted and applied, *not merely as they are written.*" *Jones* v. *Rath Packing Co.*, 430 U.S. at 526 (emphasis supplied). Furthermore, "[t]he purpose of Congress is the ultimate touchstone." *Malone* v. *White Motor Corp.*, 435 U.S. at 504 (1978).[39]

i. S.D.C.L. § 5-11-6 conflicts directly with the Act

The South Dakota statute requires payments to go directly to school districts. This statutory requirement is in fact a contradiction of the Act. Although the County's *voluntary* distribution of Section One payments to the School District would be consistent with the Act,[40] any attempt to regulate this distribution by *requiring* that payments be made directly to the School District would be, in effect, a requirement that the Section One funds go to an entity other than an eligible unit of local government

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[39] The nature and extent of the conflict may of course be gleaned not only from the statute's express language, but that implicitly contained in its structure and purpose. Shaw v. Delta Airlines, Inc., ___ U.S. ___, 103 S.Ct. 2890, 2899 (1983); Jones v. Rath Packing Co., 430 U.S. at 525.

[40] If the units of local government want to distribute some of the money to school or other special purpose districts, they certainly could as such a distribution would qualify as a use for a "governmental purpose." Lawrence County v. State of South Dakota, 513 F.Supp. at 1042; Kendall v. Towns County, 247 S.E.2d at 579.

as defined in the Act[41] and in Interior's regulations.[42] This conflicts directly with the Act's payment plan, notwithstanding the fact that payment to a school district may be deemed a governmental purpose. The state does not retain the authority to compel the county to do what it *could* otherwise do. *Chicago & Northwestern Transportation Co.*, 450 U.S. at 318.

In *Altus-Denning School District No. 31*, the court construed the predecessor to § 6901(2) to exclude school districts from the list of eligible recipients of Section One payments by upholding the Secretary's regulations expressly excluding them. (568 F.Supp. at 101, citations omitted):

> Plaintiffs have submitted numerous authorities for the proposition that the purpose of Congress was, at least in part, to compensate schools for lost revenue. This may well be true . . . However, 31 U.S.C. § 1601 provides clearly that "[s]uch payments may be used by such unit *for any governmental purpose*." "*Such unit*" refers to "unit of local government" as defined in section 1606(c).
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> Thus, even though Congress no doubt intended for some of the in lieu of tax funds to go to school districts, believing that the counties would disburse these funds with prudence, equity, and an eye to the

[41] 31 U.S.C. § 6901(2) does not list school districts as typical units of general local government. The pre-amendment version of § 1606(c) as recodified in § 6901(2) also excluded school districts. Juris.St. at 4.

[42] 43 C.F.R. § 1881.0-5. Interior's regulations in this area are entitled to deference and are controlling as to the operation of the statute. Fidelity Federal Savings & Loan Assn., 458 U.S. at 154. Further, Interior's determination that school districts are not units of government so as to be eligible to receive Section One payments has sustained judicial challenge. Altus-Denning School District No. 31, 568 F.Supp. at 101. Indeed, the correctness of this determination was affirmed by Congress in amending 31 U.S.C. § 6901(2). *See supra* note 21.

> obvious needs of the school districts, Congress nonetheless expressly allowed whichever unit constitutes the "unit of local government" of 31 U.S.C. § 1606(c) to expend these funds for any governmental purpose.
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> Without a clearer indication that Congress intended school districts to constitute "units of general government" within the meaning of section 1606(c) so as to be included within the term "unit of local government" in section 1606(c), which it could easily have so declared, either at the time or within the five years subsequent, we can hardly say that the Secretary acted in excess of his authority, unconstitutionally, or otherwise unlawfully.

Similarly, it is irrelevant whether or not the state may have had a proper motive in determining to direct Section One payments to be expended in a particular manner. "Even if the state legislature in passing its law had some purpose in mind, other than one of frustration, we must still strike down the law if it actually impedes the operation of the federal statute." *Rankin* v. *Moran*, 684 F.2d 472, 475 (7th Cir. 1982) *quoting Perez* v. *Campbell*, 402 U.S. 637, 651-52 (1971). *See also United States* v. *Med O Farm, Inc.*, 701 F.2d at 90 (state's rules rejected which would thwart federal program's objectives).[43] The South Dakota statute conflicts directly then with Congress'

[43] Although South Dakota may have strong interest in promoting education and full funding for school districts, it may not rearrange the federal program. The Act's payments *benefit* the localities where the federal lands are located and by virtue of the fact that payments are federal and no disruption or displacement of the state's freedom to structure its integral operations in areas of traditional government functions is involved, the state has no independent right under the Tenth Amendment to legislate with respect to the payments. *See* United States v. Onslow County Board of Education, 728 F.2d 628, 638 (4th Cir. 1984). *See also* National League of Cities v. Usery, 426 U.S. 833, 851, 855 (1976).

scheme for distributing Section One payments and is therefore void under the Supremacy Clause.

In *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), this Court struck down California's attempt to redirect federal pension benefits under its community property laws. Congress had determined that the benefits go to a retiree alone and the state could not reallocate them. The Court held that the federal nature of the benefits did not by itself proscribe the entire field of state control. 439 U.S. at 583. Rather, it utilized the traditional Supremacy Clause analysis to determine whether the state regulation conflicted with terms of federal law or whether its "consequences [would] sufficiently injure the objectives of the federal program to require nonrecognition." *Id.* This court found that (*Id.*):

> "[Federal law] ensures that the benefits actually reach the beneficiary. It preempts all state law that stands in its way. . . . It prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.
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> [What the state] seeks conflicts with [federal law], promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck.

The fact then that Congress directed federal payments under the Act to particular local governments means that a state may not redirect them. It is clear that the Congress can impose terms and conditions upon how its payments to the local governments are to be disbursed. *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1962). If Congress

intends to impose a condition on the grant of federal moneys, it must do so unambiguously. *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). This Congress has done without question under the Act—it has conditioned the grant on the absence of conditions. It did so in order that the beneficiary—the County—receive the funds without conditions. The State may not impose conditions for what Congress intended to be an unconditional grant.

There are two additional district court decisions similar to *Altus-Denning* and the earlier *Lawrence County* decision which hold that a state's tampering with a federal plan for distributing payments is unconstitutional. In *Shepheard* v. *Godwin*, 280 F.Supp. 869 (E.D.Va. 1968), the court struck down a Virginia law which affected Congress' scheme for providing compensation to certain school districts. Congress had sought to provide extra payments to those school districts whose populations were enlarged by federal employees' children but whose revenues had been decreased because of the presence of federal lands. 280 F.Supp. at 871. The federal government determined that supplemental payments should go directly to these school districts, but Virginia law provided that these supplemental payments would be subtracted when determining the amount of the state's payments to the school districts, thereby eliminating the helpful effect of the federal payments. 280 F.Supp. at 872-73. In holding the Virgina law invalid under the Supremacy Clause, the court concluded that "the State formula wrenches from the impacted localities the very benefaction the act was intended to bestow. The State plan must fall as violative of the Supremacy Clause of the Constitution. Our decision rests entirely on the terms, pattern and policy of the act." *Id.* at 874. The court also found that the absence of any restriction upon state action in the statute supported, rather than detracted from, the

conclusion that the states could not legislate in the area or otherwise tamper with the federal payment scheme (*Id.* at 875):

> . . . as we have already noted, the moneys are paid to the locality and not to the State, and there was no apparent reason to include any restriction upon the State. Moreover, *this omission from P.L. 874 originally, or as reenacted, would seem to imply that no touch, direct or indirect, of the money by the State was even remotely permissible.* (emphasis supplied)[44]

This same conclusion was reached by the court in *Hergenreter* v. *Hayden*, 295 F.Supp 251 (D.Kan. 1968). There the court struck down a Kansas law which sought to realign similar federal payments (*Id.* at 255):

> Neither of defendants' contentions can be sustained. We think it is clear upon the law and the evidence that the State of Kansas is tampering with the distribution of federal funds contrary to Congressional intent expressly in P.L. 874, and hence is in violation of the Supremacy Clause of the United States Constitution, Article VI, Clause 2.
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> The admitted purpose of the Kansas legislature, no matter how laudable its motive or, theoretically, how valuable its end in aiding education in federal impact

[44] Where a state asserts control over federal activities or obstructs Congressional purpose, an authorization of state regulation would be found only where Congress explicitly mandates or clearly and unambiguously authorizes such regulation. Don't Tear It Down v. Pennsylvania Avenue Development Corp., 642 F.2d 527, 536 (D.C.Cir. 1980). Such a mandate or authorization is absent here. Under Congress' recent amendment, state regulation is only authorized to the extent of redistributing payments among units of local government and not determining governmental purposes for which the local govenments can use their Section One payments. *See supra* note 21. Accordingly, the Act does not authorize states to redistribute federal funds in the manner prescribed by S.D.C.L. § 5-11-6.

> areas, was to substitute state judgment for federal judgment, as reflected in the state and federal statutes considered here. No matter how salutary the state legislation, it must give way under the Supremacy Clause.

Similarly, in *New Mexico* v. *Mescalero Apache Tribe*, ___ U.S. ___, 103 S.Ct. 2378 (1983), the Court found that a state's attempts to regulate conduct on the Mescalero Apache Tribe's reservation was an unconstitutional infringement of the Tribe's authority because of the special treaty and statutory rights conferred upon the Tribe by the federal government. The Court found that New Mexico's hunting and fishing laws, applicable throughout the state, could not be imposed on the Tribe's reservation. *Id.* at 2391. In reaching this determination, the Court looked to the historical and "crucial" backdrop of traditional notions of tribal sovereignty. Finding Congress' purpose to be the promotion of tribal self-governance, independence and power to manage its territory and resources, the Court held that the imposition of New Mexico's own laws for hunting and fishing on the land was void. (___ U.S. at ___, 103 S.Ct. at 2389, citations omitted):

> Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources. It is most unlikely that Congress would have authorized, financed, and participated in Tribal management if it were thought that New Mexico was free to nullify the entire arrangement. Requiring Tribal ordinances to yield whenever State law is more restrictive would seriously undermine the secretary's [and the Tribe's] ability to make the wide range of determinations committed to [their] authority . . .
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> The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal

> and tribal regulatory scheme but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development.
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> The disruptive effect that would result from the assertion of concurrent jurisdiction by New Mexico would plainly "stan[d] as an obstacle to the accomplishment of the full purposes and objectives of Congress" . . .

Here, Congress has insisted that the local governments operate autonomously by committing federal funds to be used in their discretion. No conditions were to attach to the Act's payments so that each local unit can determine how to best survive the impact on their budget created by the presence of federal lands. Where Congress has sought to insulate the local governments from interference in using the payments, the state may not otherwise direct their use. Indeed, to do so not only alters the purpose of distribution to local governments in the first instance, but changes the intended recipient. Under the South Dakota law, the County is merely a conduit—a cashier—for the school districts and other districts, rather than the beneficiary of the funds as Congress intended and directed. It is highly improbable that Congress would have specially created the Act's payment system only to have it rearranged by the states.

The conflict between S.D.C.L. § 5-11-6 and the Act is all the more evident from the nature of the public finance laws in South Dakota. South Dakota requires school districts to submit budgets to the county auditors and then the county spreads a levy over all the taxable property sufficient to raise the money requested. S.D.C.L. §§ 10-12-29, 13-11-3. The counties retain no independent authority on a yearly basis to determine the amounts to be budgeted to the school districts; the counties are obliged to transfer to the school districts their proportionate

share of the moneys received every month. S.D.C.L. § 13-11-7. This is the manner in which all the subdivisions of the County are funded.

During the time period covered in the School District's Complaint, it and other school districts in the County received approximately sixty percent of the total levy by Lawrence County on the county's taxable lands. J.S.App. at 10a. Under S.D.C.L. § 5-11-6, the School District and other school districts in the County would then receive sixty percent of all the in lieu payments made by the federal government to the County. *See* J.A. at 7a.[45] If all the other special districts and subdivisions petitioned the County for their proportionate share, then the County would retain no discretion to distribute the funds; it would be merely a conduit to the special districts. The County cannot overcome this result because the County is required to pay all regular tax proceeds, without reduction, to the districts. *See Rapid City Area School District No. 51-4* v. *Pennington County Auditor*, ____ S.D. ____, 284 N.W.2d 308, 312 (1979). The federal payments would therefore not perform the purpose of assisting the County in meeting its obligations—the special districts would simply receive windfalls.[46] Thus, by operation of S.D.C.L. § 5-11-6, all discretion to use the Act's payments "for any governmental purpose" is restricted—indeed eliminated.

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[45] The court below apparently thought that the School District alone would receive sixty percent of the County's payments under the Act. J.S.App. at 2a. The County's answer and the stipulation of facts, however, indicate that this sixty percent would go to other school districts in the county as well. *See* J.A. at 7a; J.S.App. at 10a.

[46] The School District has not alleged that it has not received sufficient funds to meet its needs. *See* Rapid City Area School District, 284 N.W.2d at 310.

ii. Congress' exclusive power over public lands is plenary and preempts state legislation

The South Dakota statute is also preempted because it purports to regulate activities with respect to the federal government's lands, an area exclusively reserved to Congress by the Property Clause, Article IV, § 3 cl. 2 of the United States Constitution.[47] *See Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976) (Congress has the power to determine what are "needful" rules respecting public lands); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 294-95 (1958) (the power over the public land thus entrusted to Congress is without limitations); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21-22 (1952) (the power of Congress over public lands under the Property Clause is without limitations).

Under the Act, Congress has determined that units of local government, and not state governments or special districts, are to be compensated directly for the costs associated with the presence of federal lands within their boundaries. 31 U.S.C. § 6902; *see* J.S.App. at 16a. In a sense, Section One payments are similar to any other expenditures Congress might make for the maintenance of these properties. The state's interference must therefore fall as an unconstitutional infringement on Congress' exercise of its powers under the Property Clause. "Where . . . state laws conflict with . . . legislation passed pursuant to the Property Clause, the law is clear. The state laws must recede.," *Kleppe* v. *New Mexico*, 426 U.S. at 543 (citation omitted). Further, as the Court

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[47] The payment program in the Act arises out of the federal government's ownership and operation of public lands. *See* 90 Stat. 2662. There is no question that without the Act or other statutes, local governments would not be able to tax or otherwise derive revenues from the lands. Van Brocklin v. Tennessee, 117 U.S. 151 (1886).

reasoned in *State of Minnesota by Alexander* v. *Block*, 660 F.2d 1240, 1249 (8th Cir. 1981) (footnote omitted):

> Under this authority to protect public land, Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Congress clearly has the power to dedicate federal land for particular purposes. As a necessary incident of that power, Congress must have the ability to insure that these lands be protected against interference with their intended purposes.

Inasmuch as South Dakota's redirection of the Act's payments would likely adversely affect the maintenance of the federal lands, it is void. "A different rule would place the public domain of the United States completely at the mercy of state legislation" *Kleppe*, 426 U.S. at 543 *quoting Camfield* v. *United States*, 167 U.S. 518, 526 (1897). Congress' determination is therefore final and state legislation affecting the determination is preempted by the Act's grant of discretion to the counties to expend funds for *any* governmental purpose.[48]

B. The South Dakota Supreme Court Committed Substantial Error In Its Supremacy Clause Analysis

As the foregoing amply demonstrates, the South Dakota legislation is void under the Supremacy Clause because it directly conflicts with the Act and frustrates congressional purpose. The errors committed by the Su-

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[48] Congress can constitutionally delegate its decision-making power as to expenditures of these funds to counties consistent with the Property Clause. *See* United States v. Ferry County, 511 F.Supp. 546, 552 (E.D.Wash. 1981). Here, Congress determined that units of local government are to expend funds in *their* discretion and "a state is without power by reason of the Supremacy Clause to provide the conditions on which the federal government will effectuate its policies." United States v. Georgia Public Service Commission 371 U.S. 285, 293 (1963).

preme Court of South Dakota in failing to determine that S.D.C.L. § 5-11-6 was unconstitutional are twofold. First, the court failed to analyze any of the Act's legislative history; second, the court analyzed only one sentence of the Act in isolation when it concluded that S.D.C.L. § 5-11-6 was in harmony with the Act. These errors prevented a complete evaluation of congressional purpose which is the touchstone of Supremacy Clause analysis. *Malone* v. *White Motor Corp.*, 435 U.S. at 504.[49]

i. The court improperly excluded all reference to legislative history

In ignoring the Act's legislative history, the South Dakota Supreme Court misused the well worn maxim that where legislation is purportedly clear and unambiguous on its face, there need be no resort to extrinsic aids to determine its meaning or purpose. In refusing to examine the legislative history, the court below reasoned (J.S.App. at 3a):

> [The County] would have us launch this inquiry with an examination of the legislative history of the Act. However, resort to legislative history is justified only when legislation is ambiguous or its literal meaning is absurd or unreasonable. Absent these circumstances we must give legislation its plain meaning. We cannot amend it to produce or avoid a particular result . . . In our view, the scriveners of 31 U.S.C. § 1601, wrote it in plain, clear and rational language. We therefore need not look to legislative history. By the plain words of 31 U.S.C. § 1601, the federal money distributed to appellees "may be used by such unit for any governmental purpose."

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[49] The South Dakota Supreme Court did not challenge the County's argument that federal law preempted conflicting state law under the Supremacy Clause. J.S.App. at 3a. The court simply failed to perform the required analysis to determine whether state law did conflict with the terms and purposes of the Act.

> S.D.C.L. § 5-11-6 requires distribution of these federal payments as taxes are distributed and thus school districts are recipients. Support of school districts is a governmental purpose.
>
> * * *
>
> [The County] receive[s] federal money in lieu of taxes that the entitlement land would be subject to if it were not owned by the federal government. One such tax is a school tax. We find no conflict between the two laws. If Congress intended to prohibit § 1601 funds from going to school districts, it could have done so by writing that prohibition into § 1601. However the only restriction placed on these funds is that they be used for a governmental purpose, which it is under S.D.C.L. § 5-11-6.

In the face of what appears to be a contrary interpretation of the plain meaning of the statute, the court used "the plain meaning rule" to foreclose *any* analysis of legislative history which would have proven its analysis erroneous.[50] The overlooked legislative history emphatically demonstrates that the Act's overriding purpose was to provide local governments with funds to be used, as they determine, to pay for the unique costs associated with providing services for federal lands with-

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[50] Actually, the court appears to be searching for a justification for its conclusion because it did not even analyze the "plain meaning" of the Act correctly. *See supra* Part IA. It is "plain" that South Dakota's attempt at defining a governmental purpose under the Act is inconsistent both with the word *any* as well as the grant of the funds to *local* as opposed to *state* governments. *Id.* It is especially irrelevant that Congress did not "expressly exclude" school districts in Section One. J.S.App. at 3a. Payments to schools are clearly a governmental purpose, but "any" governmental purpose is not synonomous with a specific governmental purpose determined by the state and not the unit of local government. Thus, it is evident that the plain meaning of the Act supports a finding that the state statute conflicts with the Act.

in their boundaries. *See supra* Part IB. The Act's legislative history and the express congressional purposes stated therein cannot be excluded merely because language "on its face" may be clear. "Even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1979). *See also Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) (plain meaning rule does not preclude consideration of persuasive evidence if it exists). Further, as this Court concluded in *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976), *citing United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-544 (1940):

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' "

See also Dickerson v. *New Banner Institute, Inc.*, ___ U.S. ___, 103 S.Ct. 986, 994 (1983) ("as in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes congress sought to serve"); *Jones* v. *Rath Packing Co.*, 430 U.S. at 526, ("a Supremacy Clause inquiry requires [the court] to consider the relationship between state and federal laws as they are interpreted and applied not merely as they are written."); *Rocky Mountain Oil & Gas Assn.* v. *Watt*, 696 F.2d 734, 745 (10th Cir. 1982) ("Congressional purpose and intent are best divined by examining the statute's legislative history"). *Cf. North Dakota* v. *United States*, ___ U.S. ___, 103 S.Ct. 1095, 1102 (1983) (unless

legislative intention expressed to the contrary, language of statute is conclusive).[51]

Accordingly, the South Dakota Supreme Court's attempt to ascertain the meaning of the Act on its face was an incomplete and overly simplistic inquiry; this is made evident by the fact that statutory purpose is more clearly determined from the accompanying legislative history than from a narrow reading of the Act. In this instance it expresses a diametrically opposite direction and intent than that construed by the South Dakota court. Indeed, employing the Act's legislative history, the dissent concluded that S.D.C.L. § 5-11-6 did conflict with federal law. Quoting S.Rep. No. 1262 at 9 (*see* J.S.App. at 16a-17a), Justice Dunn reasoned (J.S.App. at 6a):

> This statement makes it abundantly clear that *Congress was directing the states to keep their noses out of the manner in which a county would distribute these funds.* I believe Congress intended the county be vested with total discretion in distributing [Section One] funds. While the county may choose to distribute part of the [Section One] funds to the school district, *see Kendall* v. *Towns County*, 146 Ga.App. 760, 247 S.E.2d 577 (1978), I do not believe the county can be forced to do so as contemplated by S.D.C.L. § 5-11-6. *By the passage of S.D.C.L. § 5-11-6, South Dakota was undermining the very intent and purpose of the Act by earmarking sixty percent of the funds for school districts.*[52]

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[51] *See generally* Note, *Intent, Clear Statement and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L.Rev. 892 (1982); Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Col.L.Rev. 1299 (1975).

[52] The Comptroller General also found that the legislative history indicated Congress' intention that funds "should be distributed to local governments, who then were to make the necessary decisions

The court's failure to properly divine congressional intent allowed it to find that S.D.C.L. § 5-11-6 was not in conflict with the Act. Indeed, any state interference on its face would appear inappropriate since the Act, by directing the funds to units of local government, excluded the states' participation in how the federal funds were to be expended.[53] "If the counties wish to distribute some of the money to school and other special purpose districts they certainly may . . . However, they are not compelled to do so." *Lawrence County* v. *State of South Dakota*, 513 F.Supp. at 1042.

ii. The court misinterpreted the plain meaning of Section One of the Act and the Act's other provisions and ignored other acts which provide special relief to school districts

The majority opinion below relied heavily upon a finding that because expenditures on school districts would constitute a "governmental purpose," South Dakota could independently determine that the County must direct sixty percent of its Section One receipts to school districts. J.S.App. at 4a. While correct that expenditures for public education would be one of many legitimate governmental purposes, *see supra* note 25, the court confused the question whether education is a purpose for which the funds can be used with the more crucial inquiry of determining which governmental unit has the right under the Act to decide the governmental purposes for which the funds are actually spent. There is no question that the County is the recipient of Section One payments

on how to distribute them to meet their internal needs." 58 Comp. Gen. 19, 24 (1978).

[53] *Cf.* Rogers v. Brockette, 588 F.2d at 1072. In *Rogers*, the Court examined the legislative history and statutory scheme to determine if Congress indicated "any general distrust of state governments." *Id.* 588 F.2d at 1072. Finding none, the Court held that Texas' laws affecting the federal breakfast program were not unconstitutional. *Id.* 588 F.2d at 1073.

in the first instance. However, the court below held that the provision of funds to affected school districts under Section Three meant that school districts would still be appropriate recipients of Section One payments. "We do not believe that by earmarking school districts as recipients of [Section Three] funds Congress thereby manifested its intent to exclude them from [Section One] funds." J.S.App. at 4a. The County has not maintained that school districts are excluded from receiving Section One payments; however, they can receive those payments only in an amount determined by the County, the initial recipient. The South Dakota Supreme Court's simplistic analysis of "any governmental purpose" as embracing school districts, while ignoring other governmental purposes, undermines the basic objectives of the Act.[54]

South Dakota's tampering with the federal scheme and restriction on the county's discretion, whether or not the result the state statute achieves would have otherwise been permissible, is irrelevant. *See Jones* v. *Rath Packing Co.*, 430 U.S. at 540.[55] Accordingly, the South Dakota

[54] The South Dakota court also ignored the fact that it is the Secretary of the Interior and not the state legislature which establishes guidelines as to how Section Three payments are to be distributed to "affected" school districts. 31 U.S.C. § 6904. Further, school districts are not only expressly provided for in Section Three, but receive impact aid under 20 U.S.C. § 236 precisely to compensate them for the added costs of providing education for federal employees on federal tax-exempt lands within the school districts' boundaries. *See* Middletown School Committee v. Board of Regents, 439 F.Supp. at 1122. It would appear unnecessary for Congress to provide for them again in Section One of the Act.

[55] For this reason, the court adroitly found that it was "feasible" for the County to comply with the Act and the South Dakota statute. *Id.* "Feasibility" is not the proper standard for determining conflict and evidences the court's misunderstanding of its obligations to preserve the supremacy of federal law.

Supreme Court committed substantial error in upholding the state's power to alter the federal regulatory scheme and in failing to properly analyze the purposes and intent of Congress underlying the Act.

CONCLUSION

Congress intended the County to determine where to spend payments it received under the Act free of state influence. Congress imposed no restrictions on the County's use of the funds other than the requirement that they be used for a governmental purpose. The Act was designed in large part to ensure that Section One payments reach the units of local government first because the states were not directing enough funds to the local governments under other statutes. The South Dakota statute would defeat the intended effect of the Act by unconstitutionally supplanting the scheme created by Congress and compromising express congressional policy.

The decision below stands as the authority for the diversion and misdirection of more than $5 million annually from the appropriate local governments in South Dakota contrary to the terms and purposes of the Act. Failure to overturn that decision would invite other states to similarly misdirect the $100 million annual nationwide appropriations under the Act. This complete reworking of a considered and express congressional plan should not stand. For all the foregoing reasons, this Court should

reverse the decision of the Supreme Court of South Dakota.

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June 11, 1984

Office-Supreme Court, U.S.
FILED
AUG 11 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-240

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,

Appellants,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE IN SUPPORT OF THE APPELLEE

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LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS,

Appellants,

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1,

Appellee.

INTEREST OF THE STATE OF SOUTH DAKOTA

Defense of a statute enacted by the Legislature of the State of South Dakota, which furthers the fiscal integrity of the State of South Dakota and its subdivisions, is of great interest to the State of South Dakota. The great interest of the State of

South Dakota in this matter is based, in part, upon the Appellants' expansive interpretion of the federal Payment in Lieu of Taxes Act, 31 U.S.C. §§ 6901 et seq. This interpretation not only interferes with the internal fiscal affairs of the State of South Dakota, but also challenges the authority of the State of South Dakota to guide the fiscal affairs of its counties, which are statutorily created units of local government within the State of South Dakota.

The meaning of the federal statute, which directs the point of distribution of federal funds, and the state statute, which sets out the method of distributing such funds, are clear on their face. For that reason, it is the duty and obligation of the State of South Dakota to defend the validity of its statute against the unsupportable claim of state law interference made by the Appellants and their amici curiae.

Although this case is nothing more than a matter of statutory construction, the Appellants and their amici curiae, especially the United States, have made it a cause celebre. According to the Appellants and their amici curiae, the South Dakota statute in question is an attempt by the State of South Dakota to inhibit the flow of federal dollars made available to local governments through the provisions of 31 U.S.C. §§ 6901 et seq. The State of South Dakota therefore has a great interest in seeing not only that this matter is viewed in its proper perspective, but also that the state statute in question is found to be a valid method by the State of South Dakota to guide and manage its internal fiscal affairs.

ARGUMENTS AND AUTHORITIES

THE SOUTH DAKOTA SUPREME COURT'S DETERMINATION THAT SDCL 5-11-6 DOES NOT INTERFERE WITH THE PROVISIONS OF THE FEDERAL PAYMENTS IN LIEU OF TAXES ACT, 31 U.S.C. §§ 6901 ET SEQ., IS CORRECT.

This Court has stated that conflicts between federal and state laws which deal with the same subject matter should not be sought where no conflict exists. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). No conflict exists between the federal and state laws dealing with federal payments in lieu of taxes. The federal statute simply sets the county as the point of distribution of the funds. It does not limit, as do some federal statutes, such as the National Forest Management Act, 16 U.S.C. §§ 500 et seq., the purposes for which the federal money may be used. The money can be used "for any governmental purpose." 31 U.S.C. § 6902(a). The state statute, on the other hand, sets guidelines for the distribution of these federal funds by the county. The state statute does not in any way limit the uses of the money; it simply treats the federal payments made in

lieu of taxes the same as other types of tax revenue. SDCL 5-11-6. See also, Lead-Deadwood School District v. Lawrence County, 334 N.W.2d 24, 25-26 (1983).

Although the State is in agreement with the argument in this regard made by the Lead-Deadwood School District in its brief, some points raised by the Appellants and their amici curiae, especially those arguments dealing with the legislative history of the federal statute and the previous court decisions dealing with the federal law in question, must be considered.

A review of the House and Senate reports accompanying the federal Payments in Lieu of Taxes Act out of committee makes it clear that the overriding concern of Congress in enacting this legislation was not how the money was to be used, except that the Act did allow the money to be used "for any governmental purpose." This is different than some

federal grants, which limit the funds' use to one or two certain subjects. The main concern of Congress, instead, was that the money be distributed directly to the counties, rather than to the individual states. See, S.Rep. 1262, 94th Cong., 2d Sess. 15 (1976); H.R. Rep. 1106, 94th Cong., 2d Sess. 11-12 (1976).

Throughout this entire action, beginning with the action in the United States District Court, neither the School District nor the State of South Dakota has argued that it is not appropriate for Lawrence County to be the initial recipient of these funds. Thus, the Senate and House reports are not particularly useful in resolving the question presented in this case that deals with the intent of Congress when it used the phrase "for any governmental purpose" in section one of the Act.

Further, there is no question that these funds can be used for any governmental purpose, rather than for a single, specific purpose. Therefore, the holdings in Kendall v. Towns County, 146 Ga. App. 760, 247 S.E.2d 577 (1978), and Meade Township v. Andrus, 695 F.2d 1006 (6th Cir. 1982), are of little value in the consideration of the present issue. Likewise, Altus-Denning School District v. Franklin County, 568 F.Supp. 95 (W.D. Ark. 1983), is of limited value in this appeal. The Arkansas statute in question in Altus-Denning, unlike SDCL 5-11-6, required the federal funds to be used for school purposes only.

Because of the lack of guidance found in these materials, the plain meaning of the words of the statutes must be analyzed. The words in these statutes do not conflict.

The funds received by the counties under the provisions of 31 U.S.C. §§ 6901 et seq., in essence, are tax revenues allocated to the county for its distribution. The underlying premise in the arguments made by the Appellants and their amici curiae is that the State of South Dakota has no authority to establish in statutory form, guidelines to the counties for distribution of this type of tax money. This premise, however, is contrary to the concept of federalism and the power of the states found in the Tenth Amendment to the Constitution of the United States.

Counties are a creature of the State of South Dakota. The relationship between the State of South Dakota and its counties is set by both the state constitution and state statutes. Article IX, § 1 of the South Dakota Constitution states, in part, that "the Legislature shall have plenary powers to

organize and classify units of local government. . . ." In Title 7 of the South Dakota Codified Laws, the state legislature has not only set the county boundaries and established county officers and their duties, but has also set a wide range of laws governing general county government. Among these laws are laws dealing with county budgets and appropriations by the counties. SDCL 7-21.

Further, a county's taxing authority comes directly from the State of South Dakota. For, in addition to creating counties and their governments, the state legislature established statutory guidelines for county property tax levies. SDCL 10-12. As political subdivisions of the state, counties are clearly subject to guidance by the state in the management of their fiscal affairs. It cannot be argued that SDCL 5-11-6 is anything more than statutory guidance to the counties. Because of the

relationship between the State of South Dakota and its counties, SDCL 5-11-6 is simply a statutory guide to the management of the state's internal fiscal affairs.

The arguments by the Appellants and their amici curiae ignore this relationship. They argue, instead, that the federal statutes in question create a method of funding that is beyond the reach of the State. This argument not only ignores the role of the county within the government of the State of South Dakota, but it also ignores the powers reserved to the state, especially those powers dealing with the internal fiscal management of the State.

The Appellants and their amici curiae also argue that the money is to be delivered to the counties and distributed by them at their absolute discretion. This argument fails to take into account the fact that in

South Dakota the disbursement of funds by a county is guided by state statute. SDCL 5-11-6 provides such guidance. The claim of complete discretion found in the briefs of the Appellant and their amici curiae attempts to alter the relationship between the State of South Dakota and its counties. Federal statute cannot make such alterations. Furthermore, the plain language of this particular federal statute does not purport to make such an alteration.

Recent decisions of this Court support the right of the State of South Dakota to enact statutes, such as SDCL 5-11-6, which deal with the distribution of federal money paid to the counties in lieu of taxes. In Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 104 S.Ct. 615, 621 (1984), this Court noted (citations omitted):

> [S]tate law is . . . preempted to the extent it actually conflicts with federal law, that is, when it

> is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

See also, Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission, ___ U.S. ___, 103 S.Ct. 1713 (1983). Therefore, unless there is an overwhelming and insurmountable conflict between the federal and state laws, the state law is valid. State regulation in areas dealt with by federal legislation and regulation is not absolutely prohibited. Hancock v. Train, 426 U.S. 167 (1976). Because SDCL 5-11-6 does not conflict with the purpose or intent of 31 U.S.C. §§ 6901 et seq., the decision by the South Dakota Supreme Court, which concluded that there is no conflict between the statutes and that the state law is valid, is correct.

CONCLUSION

Based upon the foregoing arguments and authorities, the judgment of the South Dakota Supreme Court should be affirmed.

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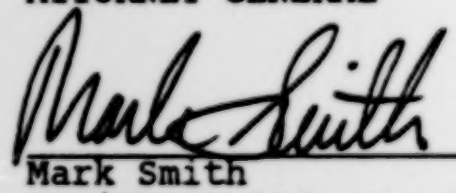

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August, 1984

Office - Supreme Court, U.S.
FILED
AUG 11 1984
ALEXANDER L. STEVAS,
CLERK

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On Appeal From The Supreme Court Of The State Of South Dakota

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QUESTION PRESENTED

1. Whether the Supremacy Clause of the United States Constitution voids the South Dakota statute which distributes federal funds paid to Lawrence County by the Payments in Lieu of Taxes Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-240

LAWRENCE COUNTY AND THE LAWRENCE COUNTY COMMISSIONERS, *Appellants*

vs.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1, *Appellee*

On Appeal From The Supreme Court Of The State Of South Dakota

BRIEF OF APPELLEE

Lawrence County and the Lawrence County Commissioners have appealed to this Court and ask that the trial court's Findings, Conclusions and Judgment be reinstated. Appellee responds and respectfully prays that the Court affirm the decision of the South Dakota Supreme Court.

Lead-Deadwood School District No. 40-1, Appellee (School District), will accept those portions of Appellant's Brief (Lawrence County) entitled OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED and STATEMENT OF THE CASE except any reference to the proposition that the payments in lieu of taxes are made to defer the costs of providing services for federal lands since there is no evidence in the record that any services are provided by Lawrence County.

SUMMARY OF ARGUMENT

The Payment in Lieu of Taxes Act provides that payments from the federal government are to be made to counties such as Lawrence County. Payments are made to Lawrence County. These payments should be made to Lawrence County.

Local governments in South Dakota are clearly susceptible to state guidance in the management of their fiscal affairs. Title 7, South Dakota Codified Laws, and Article IX, Section I of the South Dakota Constitution.

The federal statute defines the point of distribution of the funds; the state statute delineates the plan for distribution of the funds in a prudent, equitable and needy fashion.

ARGUMENT

I. The Supremacy Clause does not prohibit state regulation in areas dealt with by federal legislation and regulation.

The Supremacy Clause is a very practical and necessary part of the United States Constitution. Although rather simple in wording, the exact meaning of this clause has raised many questions. These questions began even before the Constitution was adopted. To allay fears about the potential abuse within the words of this phrase, Alexander Hamilton, in *Federalist No. 33*, discussed the necessity of the inclusion of the Supremacy Clause:

> Hence we perceive that the clause which declares the supremacy of the laws of the Union. . . only declares a truth which flows immediately and necessarily from the institution of a federal government.

Since that time, however, this area of the law has required extensive effort by the federal judiciary to achieve the proper relationship between federal and state statutes which regulate the same areas of conduct. Legislation by the federal and state governments in the same area does not necessarily mean that the state law must give way under the Supremacy Clause:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility. . . ," ***Florida Lime & Avocado Growers, Inc.***

vs. Paul, 373 U.S. 132, 142-143, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963), or where the state "law stands as an absolute obstacle to the accomplishment and execution of the full purposes and objections of Congress." *Hines vs. Davidowitz*, 312 U.S. 52, 67, 85 L.Ed.2d 581, 61 U.S. 399 (1941); *Jones vs. Rath Packing Co.*, 430 U.S. 519, 526, 540-541, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977), Accord *Decanas vs. Bica*, 424, U.S. 351, 363, 47 L.Ed.2d 43, 96 S.Ct. 933 (1976). *Ray vs. Atlantic Richfield Co.*, 435 U.S. 151, 158, 55 L.Ed.2d 179, 98 S.Ct. 988 (1978).

Obviously the Supremacy Clause does not prohibit state regulation in areas dealt with by federal legislation and regulation. *Hancock vs. Train*, 426 U.S. 167, 179-180, 48 L.Ed.2d 555, 96 S.Ct. 2006 (1976). Because the nullification of state laws under the Supremacy Clause of the United States Constitution is an extreme action by the Court, conflict between federal and state laws should not be sought where none exists. *Exxon Corp. vs. Governor of Maryland*, 437 U.S. 117, 130, 57 L.Ed.2d 91, 98 S.Ct. 2207 (1978). See also *Seagram & Sons, Inc. vs. Hostetter*, 384 U.S. 35, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966). The "absolute obstacle" and "physical impossibility" tests set forth above have not been met.

There is no doubt that the federal statutes are paramount in the area of payments in lieu of taxes under the program established by P.L. 94-565: The land is federal land and the payments are federal funds. However, state legislation in the area is possible when such laws are not in conflict or do not burden the federal enactments. A common sense reading of the federal and state statutes in question gives meaning to both statutes without destroying the original purpose of the federal law. In fact, the state law simply implements the federal purpose. As this Court held in *Florida Lime & Avocado Growers,*

Inc. vs. Paul, 373 U.S. 132, 142, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963) *reh. denied*, 374 U.S. 858, 10 L.Ed.2d 1082, 83 S.Ct. 1861 (1964):

> The test of whether both federal and state regulations may operate or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

Several factors support the School District's contention that its common sense approach to this problem should be adopted by this Court in determining the issue presented.

Soon after the passage of SDCL 5-11-6 several questions were asked of the Attorney General of South Dakota concerning the applicability of SDCL 5-11-6 to P.L. 94-565 funds received by the counties. In answer to the question of the applicability of SDCL 5-11-6 when P.L. 94-565 specifically directs the payments to a general purpose unit of government, the Attorney General of South Dakota stated, in part, that

> These statutory provisions, however, do not make it unlawful or inappropriate for the state legislature to require that such funds to be utilized in a manner similar to any other tax monies raised by the county. Absent federal restrictions on the use of these funds for school purposes, these funds can be used for legitimate governmental purposes such as schools. *Kendall vs. Towns County*, 247 S.E.2d 577 (1978). AGR 80-12, P.3.

The issue presented in this action also requires a discussion of the relationship between the State of South Dakota and the several counties of the state. Article IX, Section 1 of the South

Dakota Constitution states, in part, that "the Legislature shall have plenary powers to organize and classify units of local government..." In Title 7 of the South Dakota Codified laws, the State Legislature has not only set the county boundaries and established county officers and their duties, but has also set forth a wide range of laws governing general county government. In addition to this development of county government, the State Legislature has also, in Chapter 10-12 of the South Dakota Codified Laws, established statutory guides for state and local (meaning counties and municipalities) property tax levies. Having followed these state statutory guidelines in setting tax rates and determining the distribution scheme of their normal tax revenues, it is incongruous for Lawrence County to now say that federal funds they receive *in lieu of these same taxes* are not required to be distributed, in accordance with state law in the same manner as other tax revenues are distributed. As political subdivisions of the state, the counties are clearly susceptible to state guidance in the management of their fiscal affairs. SDCL 5-11-6 is state guidance to the counties for payments they receive in lieu of taxes. Combining this state-county relationship, then, with the compatible reading of SDCL 5-11-6 and P.L. 94-565 helps to show the fallacy of Lawrence County's claim.

To stretch the meaning of the phrase "for any governmental purpose," as Lawrence County suggests, is incorrect. The design behind the inclusion of the phrase "for any governmental" purpose in P.L. 94-565 is to eliminate the restrictions on the money's use. Under many federal funding programs, the money funneled to the state or county can be used only for roads, schools or other specified uses. The questioned phrase in P.L. 94-565 simply eliminates these restrictions.

The reserved powers of the states are not superceded by federal legislation unless there is a clear and manifest intent of

congress. *Chicago and N.W.T.R. Co. vs. Kalo Brick and Tile Company*, 450 U.S. 311, 67 L.Ed.2d 258, 101 S.Ct. 1124 (1981); *Ray vs. Atlantic Richfield Co.*, 435 U.S. 151, 55 L.Ed.2d 179, 98 S.Ct. 1988 (1978); *Rice vs. Santa Fe Elevator Corp.*, 331 U.S. 218, 91 L.Ed.2d 1447, 67 S.Ct. 1146 (1947).

The School District seriously questions the applicability of either *Kendall vs. Towns County*, 247 S.E.2d 577 (GA 1978) or *Meade Township vs. Andrus*, 695 F2d 1006 (6th Civ. 1982). Both of these decisions have been previously cited by Lawrence County to support their claims concerning P.L. 94-565. Neither provides such support. In *Kendall*, the Court stated:

> Since under the law as written, it is provided that the funds may be used for any governmental purpose, the Secretary recognized the "limitations cannot be placed upon the use of these funds by regulations." Thus, in dispensing the funds there are no provisions in the regulations stating how the funds are to be used. *Kendall, supra* at 579.

This excerpt actually supports the School District's basic contention. According to *Kendall*, the Secretary of the Interior cannot, by regulation, require that the P.L. 94-565 funds be used to support only schools, only roads, or only rural sewage systems. This reading is argument that P.L. 94-565 funds are to be used to provide support, in the same manner as regular tax revenues provide support, of all the governmental services supplied by the county.

Meade Township, supra, discusses the question of the proper unit of local government to receive, directly from the federal government, the P.L. 94-565 monies. Because of the importance of townships in Michigan, the federal trial court ordered the Secretary of the Interior to restudy the validity of

his determination that the county is the proper unit of local government in Michigan. The question presented in the present action is not addressed in *Meade Township*. The School District does not question the propriety of the county as the unit of government in South Dakota which should initially receive the P.L. 94-565 funds.

Similarly the reliance upon *New Mexico vs. Mescalero Apache Tribe*, __U.S.__, 103 S.Ct. 2378 (1983) is misplaced. This Court has a continuous line of decisions concerning tribal sovereignty. County governments are not sovereignties but are creatures of the legislature. Article IX, Section 1 of the South Dakota Constitution.

Lawrence County's reliance upon *Altus-Denning School District No. 31, et al vs. Franklin County, et al,* 568 Fed. Supp. 95, (WD Ark. 1983) is also misplaced. Lawrence County continues throughout its Appellant's Brief to misdirect the Court's attention away from SDCL 5-11-6 to the proposition that the School District is asking that they be an eligible recipient of Section One Payments. In *Altus-Denning School District No. 31,* the secretaries regulation expressly excluded school districts from the list of eligible recipient of Section One payments. The School District has never asked or prayed for the proposition that they be the direct recipient of Section One payments. In fact, the Court in *Altus-Denning School District No. 31,* specifically acknowledged that "Congress no doubt intended for sum of the in lieu of tax funds to go to school districts,". (568 Fed. Supp. at 101)

Lawrence County also relies upon *Hisquierdo vs. Hisquierdo,* 439 U.S. 572 (1979). This Court in interpreting the Railroad Retirement Act stated that (439 US at 592):

> The critical terms here include a specific beneficiary protected by flat prohibition against attachment and anticipation.

Anti attachment provisions insure that the benefits actually reach the beneficiary. *Philpott vs. Essex County Welfare Board,* 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973). There is nothing in this Act that precludes the county from distributing monies paid under the Act to school districts, or distributing these monies for any other governmental purpose.

II. The South Dakota Supreme Court properly looked at the clear wording of the Act.

Resort to legislative history is justified only when legislation is ambiguous or its literal meaning is absurd or unreasonable. The South Dakota Supreme Court concluded that "the scrivenerous of 31 USC Section 6901 wrote in plain, common, clear and rational language. We therefore need not look to legislative history." 334 NW2d at 25; See also *Tennessee Valley Authority vs. Hill,* 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296-97 n. 29, 57 L.Ed.2d 117 (1978), and cases cited therein.

It is not relevant that school districts are eligible for Section Three monies under the Act or that they receive other monies under other federal acts. The real question is does the statute preclude counties from distributing Section One monies to school districts. The Act is clear. There is no restriction on the county. *Altus-Denning School District No. 31, et al vs. Franklin County, et al,* 568 Fed. Supp. 95, 101 (WD Ark. 1983)

III. SDCL 5-11-6 does not conflict directly with the Act.

First, School District wishes to reiterate by reference the arguments contained in its Supremacy Clause arguments found in I.

Lawrence County relies heavily upon *Altus-Denning, Shepard vs. Goodwin,* 280 Fed. Supp. 869 (E. D. Va. 1968) and *Hergenreter vs. Hayden,* 295 Fed. Supp. 251 (D. Kan. 1968).

The district court in *Shepard* held that (280 Fed. Supp. at 874):

> The Act makes these propositions clear: (1) The federal funds are exclusively for supplementation of the local sources of revenues for school purposes; and (2) the Act was not intended to lessen the efforts of the state.
>
> Further at 874, the court goes on:
>
> The (legislative history) underscores the Congressional mandate that the impact payments are for local use and are not to be applied to compensate the State in any respect.

In *Shepard* the district court was interpreting Public Law 874 codified at 20 USC Section 236 et. seq. (Supp. 1967). The statute, as the court found, made it clear that the payments under this Act were not to be applied to compensate the state in any respect. The Act itself clearly, and the congressional history clearly, forbade the state of Virginia to reduce their state aid for education by these federal payments. This is quite different and totally distinguishable from the Act now before the Court.

Nowhere in the Act is the county precluded from giving school districts their proportionate share of each payment dollar. Nowhere in the Act or its legislative history is there any reference to restricting or forbidding the county from complying with SDCL 5-11-6.

The district court in *Hergentreter* interpreted the same statute, i.e. 20 USC Section 236 et. seq.. Under the Kansas School Foundation Act the state was required to deduct 25% of the total amount of the federal funds received from state aid received by a school district. The district court found, as the district court in *Shepard* found, that the Act, P.L. 874 makes it abundantly clear that the state is to have no control over these funds. The Kansas district court reaffirms the proposition that congress was clear as to the involvement of the state concerning these funds.

That is not true of the Payment In Lieu Of Taxes Act, 31 USC Section 6901, 6902 and 6903.

All SDCL 5-11-6 does is direct the county to expend its Section One payments with "prudence, equity and eye to the obvious needs of the school district." *Altus-Denning School District No. 31 vs. Franklin County,* 568 Fed. Supp. 95, 102 (W.D. Ark. 1983)

Conclusion

The federal program under the Payment In Lieu Of Taxes Act, 31 USC Section 6901 et. seq. which makes payments to counties in lieu of taxes for federal lands within the counties and the state statutes which provide for the distribution of these federal payments in the same manner as taxes are distributed are totally compatible. When read with a common sense ap-

proach, the two Acts are not only compatible, but also practical. The federal statute defines the point of distribution of the funds; the state statute delineates the plan for distribution of the funds in a prudent, equitable and needy fashion.

Based on the foregoing arguments and authority, the Supreme Court of the United States should enter its order affirming the decision of the South Dakota Supreme Court found at 348 NW2d 24 (SD 1983).

Respectfully submitted,

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August 11, 1984